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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

Ursula Hall,

Petitioner

v.

Continental Airlines, Inc.,

Respondent

On Petition For Writ Of Certiorari To The Fifth Circuit Court of Appeals

---

PETITION FOR WRIT OF CERTIORARI

Ursula Hall
Counsel of Record
Post Office Box 233
Houston, Texas 77001
(713) 440-6900

QUESTIONS PRESENTED

I. Whether the Fifth Circuit Court of Appeals' sanction of a lower court's dismissal of a civil rights plaintiff's cause of action based upon the improperly stated rule of law that the action is untimely based upon the date the Equal Opportunity Commission *issued* a right to sue letter, rather than the ate on which the plaintiff *received* the letter, is such a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power?

II. Whether the following civil rights issue, of first impression, is sufficiently important to this Court, to be decided by this Court: Whether a written statement complaining of fears of "workplace harassment," preceded by an oral complaint of sexual harassment, and including a statement that one fears "further retaliation," is sufficient to constitute legally cognizable opposition conduct?

III. Whether the Fifth Circuit Court of Appeals entry of a judgment holding that the statute of limitations on a discrimination suit begins to run on the date the Equal Opportunity Commission *issues* a right to sue letter, rather than the date on which one *receives* a right to sue letter, conflicts not only with the law of other Circuits, but also its own.

PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ursula Hall respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on October 26, 2007.

OPINIONS BELOW

The unreported, October 26, 2007 opinion of the court of appeals is set out at pages 1- 9 of the Appendix. The December 11, 2007 order of the court of appeals denying rehearing, which is not officially reported, is set out at page 32 of the Appendix. The Order, dated July 11, 2005, converting Defendant Continental Airlines Inc.'s 12(b)(6) motion to one for summary judgment is set out in the Appendix at pages 33-34. The Order denying Defendant Continental Airlines Inc.'s converted 12(b)(6) motion-summary judgment motion, dated November 18, 2005, is set out at pages 51-53 of the Appendix. The Memorandum and Recommendations recommending that Defendant's Motion for Summary Judgment be granted, adopted by the district court, and establishing the final judgment entered on January 5, 2007, is set out at pages 60-83 of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on October 26, 2007. A timely petition for

rehearing was denied on December 11, 2007. The Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 704(a) of Title VII, 42 U.S.C. §2000e 3(a) provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees ...because he has opposed any practice made an unlawful employment practice by this subchapter...

Section 704(a) of Title VII, 42 U.S.C. §2000e-5(f)(1) provides in pertinent part:

> [T]he Commission... shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge...

STATEMENT OF THE CASE

Petitioner Ursula Hall was employed by Defendant Airline for seven years. Originally, a part-time Airport Services Agent, following a lauded performance as an excellent provider of customer service at the airport, Ursula was promoted to a full-time, managerial position as a Customer Service Manager.

Every permanent rating Ursula ever received in her Customer Care Manager position was laudatory; specifically, "on target." In the Defendant Airline's parlance, "on target" means the following: "On target (OT) employees contribute to the organization and meet all performance standards. These employees are recognized as being essential to their job function. They are valued team members and individual contributors."

Despite this positive performance record, after filing an oral complaint of sexual harassment, and a subsequent written complaint of retaliation and "workplace harassment," Ursula was fired. The firing was based on allegations of "overall poor performance" and misconduct.

The federal trial court refused to grant any of the Defendant Airline's motions based upon alleged untimeliness of the Original Complaint. The trial court specifically admonished the Defendant Airline that its motions directed toward untimeliness were "clearly inapplicable to Plaintiff's complaints." Furthermore, the trial court ruled in favor of Petitioner Ursula, and denied Defendant Airline's

motion for summary judgment on the matter of timeliness.

Outrageously, nonetheless, without any intervening changes in law or fact, and despite the admonishment to the Defendant Airline about its "inappropriate" timeliness motions, and in derogation of the law of the case doctrine, the district court granted Defendant Airline's re-urged motion for summary judgment on the matter of timeliness. The Fifth Circuit Court of Appeals sanctioned this departure from accepted and usual judicial proceedings.

Additionally, erroneously, the trial court found that a written complaint, which written complaint followed an unaddressed oral complaint of sexual harassment, spelling out a "fear of further retaliation" and announcing a "complaint" of "workplace harassment" was insufficient to constitute opposition conduct.

Petitioner Ursula argued that "workplace harassment" was a term of art, used by courts, scholars, legal writers, and regulatory agencies to denote illegal, discriminatory conduct and that as such, a written complaint about the same, constituted cognizable opposition conduct. The United States District Court for the Southern District of Texas and the Fifth circuit Court of Appeals held that writing, and delivering, a letter of complaint, announcing a "fear of further retaliation" an a "complaint of workplace harassment," following an employer-acknowledged oral complaint of sexual harassment, was not opposition conduct.

REASONS FOR GRANTING THE WRIT

In support of her petition for writ of certiorari to review the Fifth Circuit Court of Appeals' affirmation of the district court's grant of summary judgment, Petitioner, Ursula Hall, asserts the court erred by 1) violating this Court's laws on prematurity, 2) violating most every federal court's dictates on the law of the case doctrine, including its own, and 3) improperly stating the rule of law on timeliness of discrimination complaints.

Additionally, writ should be granted to resolve the undecided issue of whether a complaint of "workplace harassment," made in writing, to a Human Resources Executive, to whom an oral complaint of sexual harassment had already been made and not acted upon, which writing also included references to fear of "further retaliation" and the company's Harassment in the Workplace Guidelines, is sufficient to communicate opposition to discrimination in the workplace.

This Court has ruled repeatedly and unequivocally that the threshold issue for consideration of summary judgment is whether there has been adequate discovery; specifically, summary judgment can never be appropriate until after adequate discovery, upon a finding of no genuine dispute over any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 465 U.S. 564

(1986). Despite proper notice, and the absence of a court order permitting non-appearance, Defendant-Respondent Continental Airlines did not appear for deposition, Defendant-Respondent Continental Airlines' employee did not appear for deposition. Similarly, Defendant-Respondent Continental Airlines refused to timely respond to discovery. Despite properly filed and pending discovery motions challenging Defendant-Respondent Continental Airlines' behavior, the court entertained, and granted Defendant-Respondent's motion for summary judgment.

In a prior summary judgment ruling in the case, the district court found that Petitioner Ursula's suit was timely. Defendant-Respondent Continental Airlines did not object to that ruling, in any way. The ruling in favor of Respondent Ursula was based upon uncontroverted evidence of the day on which she *received* her right to sue notice. The evidence included a statement from the United States Postal Service records stating the exact date and the exact time at which the mail was received. The law of the case doctrine is sound judicial doctrine recognized by every Circuit in the nation, including the Fifth Circuit, except in Petitioner's case below. "Inconsistency is the antithesis of the rule of law... [So t]he law –of-the-case-doctrine [provides]: the *same issue* presented a second time in the *same case* should lead to the same result..." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996). The district court previously ruled, on a summary motion, that the suit was timely. There were no intervening changes in law or fact, and no changes were argued. The court should have again ruled in favor of timeliness of the Petitioner's suit.

The discrimination suit was filed timely when the statute of limitations is properly measured from the date on which notice was *received*, rather than the unknown and unproven date on which the notice was "issued." The Fifth Circuit ruling below conflicts with the well settled law of other Circuits and its own. See e.g. *Huston v. General Motors Corp.*, 477 F.2d 1003 (8th Cir. 1973); *Houston v. Sidley & Austin*, 185 F.3d 837 (7th Cir. 1999); *Bunch v. Bullard*, 795 F.2d 384 (5th Cir. 1986). The suit should not have been dismissed, on the grounds that it was untimely based upon the date on which it was *issued*, as the Fifth Circuit Court of Appeals and the United States District Court for the Southern District of Texas erroneously held. This Court should exercise its supervisory powers and correct this gross misstatement of the rule of law and this great injustice to the Petitioner.

This Court should resolve the matter of whether an aggrieved employee has put an employer on notice that it opposes discriminatory conduct when he or she complains, in writing, or retaliation and "workplace harassment," after complaining orally of sexual harassment. It is an important, threshold matter of discrimination law and fundamental fairness.

Ultimately, in the Fifth Circuit and some others, an aggrieved party complaining of discrimination is to summon up "magic words" in order to satisfy the legal threshold for announcing discrimination by an employer. So very many words it seems are insufficient to satisfy the opposition

clause of the retaliation discrimination statutes. Petitioner argues that if one announces orally or in writing that she fears "further retaliation," that announcement in and of itself should be sufficient to constitute opposition to retaliation discrimination. After all, "the United States Supreme Court has determined that retaliation is simply a different form of discrimination, and one that is included within the broad-based prohibitions of discrimination." *Humphries v. CBOCS*, 474 f.3D 387, 400 (7th Cir. 2007). Undeniably, retaliation is prohibited discrimination. If one complains of retaliation, and then is fired in response to that complaint of retaliation, one should be protected under Title VII's retaliation provisions. This is especially so when one has already orally lodged an employer-acknowledged complaint of sexual harassment.

Likewise, if one complains of "workplace harassment," it ought to be "illegal" for an employer to claim that it was unaware that an aggrieved employee was complaining of unlawful discrimination. Especially when the employer's written policy statement on the subject of harassment is labeled "Harassment in the Workplace," or "Workplace Harassment," or some similar name. The term "workplace harassment" is in case law, case books, law class catalogs, law review articles, legal journals, and government websites describing discrimination laws. It is beyond comprehension that those same words have no legal significance when written to a Human Resources Executive, who has already interviewed the aggrieved party, received a complaint for sexual harassment, and allegedly begun an harassment investigation.

CONCLUSION

This Court should hear the matters Petitioner humbly submits herein.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
October 26, 2007
Charles R. Fulbruge III
Clerk

No. 07-20237
Summary Calendar

URSULA HALL

Plaintiff-Appellant

v.

CONTINENTAL AIRLINES INC

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:05-CV-158

Before KING, DAVIS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Ursula Hall ("Hall") appeals the district court's grant of the defendant's motion for summary judgment. We AFFIRM.

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* Pursuant to 5th Circuit R. 47.5 the court has determined that this opinion should not be published an is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

I. FACTS AND PROCEEDINGS

Continental Airlines, Inc. ("Continental") hired Hall as am airport ticket agent in 1996. In October 200, she began working in the Customer Care Department. As a Customer Care Representative, Hall's duties included

receiving customer complaints, researching the complaints, appropriately responding to customers, and documenting her responses to customers in Continental's files.

In February 2002, Hall failed to address and document a customer complaint. Three months passed, and Hall's supervisor Joycelyn Barrow ("Barrow"), intervened and responded to the customer's complaints about Continental's service and Hall's lack of response. Barrow discussed Hall's poor job performance after the incident with her in May 2002. By October 2002, Barrow rated Hall's job performance as "On-Target Minus" and developed a performance improvement plan for her. Hall insisted upon tape-recording a mandatory job evaluation meeting with Barrow, but when the meeting was postponed, Hall refused to meet with Barrow. In December 2002, Hall objected again to meeting with Barrow and being required to participate in a performance improvement plan.

On December 16, 2002, Barrow and Judy Dyer ("Dyer"), Director of Customer Care, met with Hall to discuss Continental's expectations regarding her productivity and job performance.

Continental had received another customer complaint regarding Hall's lack of timely customer service. They reminded Hall of her obligation to provide polite, timely responses to customer complaints and to document her interactions in resolving complaints. At the meeting, Hall accused Barrow of harassment.

Hall's allegation was investigated by Continental's Managing Director of Human Resources, Gigi Jensen ("Jensen"). Jensen met with Hall on December 18, 2002 to discuss the complaint. Hall complained of Barrow's numerous written communications and e-mails which she felt were micromanaging. Afterward, Hall took an extended vacation and, upon her return to work in late January 2003, Dyer changed Hall's performance rating to "On-Target."

By March 2003, Continental continued to receive customer complaints regarding Hall's job performance. Hall, now supervised by Suzanne Venn ("Venn"), was advised that her work files were under review and that the result of the review could mean discipline or discharge. On April 25, 2003, Venn and Service Manager, Renee Mobley, held an investigatory meeting with Hall to discuss the serious problems discovered by the quality assurance review. The
review revealed that Hall had closed customer complaint files when the complaint had not been resolved, documented customer responses that were never sent, and reopened closed files only to close

them again, so that she could get credit for successfully resolving customer complaints.

On April 29, 2003, Hall submitted a formal written complaint of "workplace" harassment. She made no allegation of harassment based upon a protected category, but expressed her "fear of retaliation" and alleged that her supervisors had "violated [her] due process rights." Jensen reviewed Hall's complaint but concluded that none of the allegations were related to Hall's race or sex.

Based on the results from the review of Hall's work files, Continental terminated her employment on May 2, 2003. Hall filed a complaint with the Equal Employment Opportunity Commission ("EEOC") on May 21, 2004, after initially filing a charge with the Civil Rights Division of the Texas Workforce Commission. She alleged that she was subjected to unlawful discrimination on the basis of her sex and that she had been terminated in retaliation for complaining about that conduct. She received a right-to-sue notice from the EEOC dated September 29, 2004, but did not file a lawsuit in federal court until January 18, 2005. In her complaint, she alleged that Continental had discriminated against her on the basis of race and sex, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. §§ 2000e-2000h-6, and the Civil Rights Acts of 1866 and 1871, as amended, 42 U.S.C. §§

1981, 1983. She also claimed that she had been terminated out of retaliation. Finally, Hall alleged

state law claims of assault, defamation, and "negligent hiring and retention."

The district court adopted the magistrate judge's report and recommendations, finding that Hall's lawsuit was not timely filed, that her claims of discrimination and retaliation under Title VII failed on the merits, and that her state law causes of action were abandoned due to her failure to comply with applicable statutes of limitation.

II. STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*, applying the same standards as the district court. *Strong v. Univ. Healthcare Sys., L.L.C.*, 482 F.3d 802, 805 (5th Cir. 2007). Summary judgment is proper when there exists no genuine issue of material fact and the movant is entitled to judgment as matter of law. FED. R. CIV. P. 56(c). "The evidence and inferences from the summary judgment record are viewed in the light most favorable to the nonmovant." *Minter v. Great Am. Ins. Co. of N.Y.*, 423 F.3d 460, 465 (5th Cir. 2005). To survive a summary judgment motion, the nonmovant "need only present evidence from which a jury might return a verdict in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

III. DISCUSSION

A. Hall's Title VII Claims

Title VII disallows discrimination in hiring or termination of an individual based on his race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Before an individual can pursue a Title VII claim in federal court, she must first exhaust her available administrative remedies. *See Taylor v.*

Books A Million, Inc., 296 F.3d 376, 378–79 (5th Cir. 2002). Exhaustion occurs when an individual files a timely complaint with the EEOC, her claim is dismissed by that agency, and the agency informs her of her right to sue in federal court. *Id.*

at 379. Once the EEOC has issued a right-to-sue letter, an individual has ninety days in which to file a civil action in federal court. 42 U.S.C. § 2000e-5(f)(1). Indeed, "[t]his requirement to file a lawsuit within the ninety-day limitation period is strictly construed." *Taylor*, 296 F.3d at 379.

The EEOC dismissed Hall's complaint and provided notice of her right to sue on September 29, 2004. She filed this lawsuit in federal court on January 18, 2005, more than 100 days after the EEOC notified her of her right to sue. Hall does not address this issue and does not provide proof of the date she received the notice. When the actual date of receipt is unknown, "courts have presumed various receipt dates ranging from three to seven days after the letter was mailed." *Id.* at 380. Even if we add several days to the ninety-day limit to allow for Hall's actual receipt of the notice, her complaint was filed untimely. Therefore, we hold that the district court properly dismissed Hall's Title VII claims.[1]

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[1] Even if her Title VII claims had been filed timely, her claim for race discrimination is barred because she did not raise that issue in her EEOC complaint. Courts may not consider claims brought under Title VII that were not included in a charge of discrimination with the EEOC. *See Nat'l Ass'n of Gov't Employees v. City Pub. Serv. Bd.*, 40 F.3d 698, 711–12 (5th Cir.

B. Hall's § 1981 Claim

Hall claims that Continental discriminated against her on the basis of her race, in violation of 42 U.S.C. § 1981.[2] Section 1981 protects the right to enforce contracts without respect to race. 42 U.S.C. § 1981. This Circuit permits the prosecution of § 1981 claims that involve alleged discrimination of at-will employees. *See Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 425 (5th Cir..2000).

The analysis for claims under § 1981 and Title VII are identical and employ a burden-shifting framework for evaluating discrimination claims. *See Jones v. Robinson Prop. Group, L.P.*, 427 F.3d 987, 992 (5th Cir. 2005); *Raggs v.Miss. Power & Light Co.*, 278 F.3d 463, 468 (5th Cir. 2002). In cases involving termination for workplace rule violations, an individual must first establish a *prima facie* case for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). A *prima facie* case can generally be established if the plaintiff can show that he is a member of a protected class, he was qualified for the position that he held before being fired, he was fired or suffered other adverse employment action, and that similarly situated

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1994).

[2] Hall also made a discrimination claim under § 1983, but this statute prohibits only discriminatory behavior suffered at the hands of state actors. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982). Because Hall has not alleged discriminatory behavior by a state actor, § 1983 is inapplicable. Thus, we find that the district court properly dismissed her §1983 claim.

individuals outside of his protected class were treated more favorably. *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 512–13 (5th Cir. 2001); *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1090 (5th Cir. 1995). If a *prima facie* case for discrimination can be established, then the burden shifts to the defendant to rebut the plaintiff's case by articulating a legitimate, nondiscriminatory reason for any alleged unequal treatment. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253–56 (1981); *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993). If the defendant presents such a reason, then the burden shifts back to the plaintiff to show that the defendant's reason for termination is not true, but is a mere pretext for discrimination, or that the reason is true, but the plaintiff's race was a motivating factor. *McDonnell Douglas*, 411 U.S. at 804–05; *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 341 (5th Cir. 2005).

Here, Hall fails to establish a *prima facie* case for race discrimination. Although the record indicates that at one time Hall was qualified for the job she held with Continental, and that she was later fired from that job, she presented no evidence that similarly situated individuals outside of her protected class were treated more favorably. Therefore, our analysis ends here and we hold that the district court properly dismissed Hall's § 1981 claim.

C. Hall's State Law Claims

Hall claims that, under Texas law, Continental is liable to her for assault, defamation,

and "negligent hiring and retention." However, she neglected to provide any argument or support for these claims in her brief. Because "[i]nadequately briefed issues are deemed abandoned," this Court will not consider this issue. *United States v. Charles*, 469 F.3d 402, 408 (5th Cir. 2006).

IV. CONCLUSION

The judgment of the district court is AFFIRMED.

No. 07-20237

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

URSULA HALL,

Plaintiff-Appellant, Pro Se,

v.

CONTINENTAL AIRLINES, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

PETITION FOR PANEL REHEARING

Ursula A. Hall, *Pro Se*
Post Office Box 233
Houston, Texas 77001-0233
(713)440-6900

Petition for Panel Rehearing

I. The opinion misapprehends the portions of the law of *Taylor v. Books A Million*, 296 F.3d 376 (5th Cir. 2002) it applies in this case and overlooks other portions, erroneously finding that the date the statute of limitations begins to run on a right- to-sue letter is the date of "issue," rather than the date of receipt

II. The opinion completely and erroneously overlooks the valid summary judgment evidence on the matters of timeliness and date of receipt submitted by Plaintiff-Appellant Ursula Hall

III. The opinion totally and erroneously overlooks the court's summary judgment order [issued in] favor of Plaintiff-Appellant, determining the lawsuit timely, and completely misapprehends or overlooks the related matter of the law of the case doctrine

IV. The opinion erroneously misapprehends or overlooks the entire matter of discrimination law to which the Appellant's brief was devoted: retaliation based upon sex discrimination, retaliation discrimination, and related matters of prematurity

Summary of Argument

The only matters briefed by Appellant, and the only issues properly before the court, are (1) timeliness of Appellant's petition, (2) substantive actions for sex

discrimination and retaliation discrimination, and (3) matters reasonably related to issues (1) and (2).

The panel opinion reflects a misapprehension of the law of *Taylor v. Books A Million*, 296 F.3d 376 (5th Cir. 2002), the law of summary judgment and the law of the case doctrine. Correspondingly, the panel opinion reflects a misapprehension and disregard for the facts of the instant case, related to each of those matters of law.

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The opinion misapprehends the portions of the law of *Taylor v. Books A Million*, 296 F.3d 376 (5th Cir. 2002) it applies in this case and overlooks other portions, erroneously finding that the date the statute of limitations begins to run on a right- to-sue letter is the date of "issue," rather than the date of receipt.

The United States Equal Employment Opportunity Commission, Form 151, entitled "Dismissal and Notice of Rights," clearly states, on its face, in its section entitled "Notice of Suit Rights," that a claimant must file his or her lawsuit "**WITHIN 90 DAYS of your receipt of this notice.**" In conformity with this statement of Title VII law, printed on the face of the federal form, this Circuit affirmed in *Taylor v. Books A Million*, "claimants have ninety days to file a civil action after *receipt* of such a notice from the EEOC." 296 F.3d at 379 citing *Nilsen v City of Moss Point, Miss.*, 674 F.2d 379, 381 (5th Cir. 1982) citing 42 U.S.C. §2000e-5(f)(1) [emphasis in original]. Likewise in *Bunch v. Bullard*, a case cited to in *Taylor*, with a pinpoint citation to the relevant receipt law, this Circuit affirmed that on the "Title VII Threshold Issue[ ]" of

"Timeliness," unequivocally, "the relevant date was the date of receipt of the right to sue letter." 795 F.2d 384, 388 (5th Cir. 1986).

Comparatively, the panel opinion in this case misapprehends the law, stating, erroneously: "Once the EEOC has issued a right-to-sue letter, an individual has ninety says in which to file a civil action in federal court. 42 U.S.C. §2000e-5(f)(1)." Opinion at p.5. This statement of law is clearly erroneous. In fact, it is the exact same error this Circuit corrected in the *Taylor* case, the case to which this panel cites for authority.

In *Taylor v. Books A Million*, this very Circuit found as follows:

> The district court held that Taylor's lawsuit, which was filed ninety-eight days after the EEOC issued him a right to sue letter, was untimely. Although Title VII provides in no uncertain terms that the ninety-day period of limitations begins to run on the date that the EEOC right-to-sue letter is received, the district court erroneously determined that the operative date is the day the letter was issued. *Bunch v. Bullard*, 795 F.2d 384, 387-88 (5th Cir. 1986) (holding that the ninety-day period within which a plaintiff has to file a claim against an employer begins to run, not when the right-to-sue letter is issued by the EEOC, but when the plaintiff received the letter)...

296 F.3d at 379.

Furthermore, the panel opinion misapprehends the law of timeliness in Taylor by its incomplete treatment of the relevant law on the matter: the "strict[ ] contru[ction]" of the timeliness law of Taylor applies to the "receipt" of a notice of a right to sue. The panel opinion's reference to "exhaustion" also misapprehends the law. Inaccurately, the panel opinion states:

> Exhaustion occurs when an individual files a timely compliant with the EEOC, her claim is dismissed by that agency, and the agency informs her of her right to sue in federal court. [*Taylor v. Books A Million*, 296 F.3d 379 (5th Cir. 2002).]

Panel Opinion at p.4-5.

In fact, the *Taylor* case specifically and correctly states the following:

> Exhaustion occurs when the plaintiff files a timely charge with the EEOC and receives a statutory notice of right to sue. *Dao v. Auchan Hypermarket*, 96 F.3d 787, 788-89 (5th Cir. 1996). Title VII provides that claimants have ninety days to file a civil action after receipt of such a notice from the EEOC. *Nilsen v. City of Moss Point, Miss.*, 674 F.2d 379, 381 (5th Cir. 1982) (citing 42 U.S.C. § 2000e-5(f)(1) (1994)). This requirement to file a lawsuit within the ninety-day limitation period is strictly construed. See *Ringgold v. National Maintenance Corp.*, 796 F.2d 769, 770 (5th Cir. 1986); *Espinoza v. Missouri Pacific R.R. Co.*, 754 F.2d 1247, 1251 (5th Cir. 1985)... Title VII provides in no uncertain terms that the ninety-day period of limitations begins to run

> on the date that the EEOC right-to-sue letter is received, the district court erroneously determined that the operative date is the day the letter was issued.
>
> 5

Taylor v. Books A Million, 296 F.3d at 379 (5th Cir. 2002).] The strict construction requires strict adherence to the entirety of the relevant law: receipt is the trigger for the ninety-day limitation.

Just as this Circuit held in *Bunch v. Bullard*, 795 F.2d 384, 387-88 (5th Cir. 1986), and as affirmed in the dispositive case of *Taylor v. Books A Million*, 296 F.3d 379 (5th Cir. 2002), a court errs whenever it treats the operative date for timeliness as the date the EEOC *issues* a notice, or *informs* a claimant, of her right to sue, rather than the date on which a claimant *receives* notice of the right to sue.

The opinion completely and erroneously overlooks the valid summary judgment evidence on the matters of timeliness and date of receipt submitted by Plaintiff-Appellant Ursula Hall.

The panel opinion misapprehends, or entirely overlooks, the material facts of evidence establishing the actual date Plaintiff Ursula Hall received the notice of the right to sue. The panel erroneously opines that Ursula Hall did "not address the [timeliness] issue and [did] not provide proof of the date she received notice." Panel Opinion at p.5.

The panel's factual determination regarding Ursula Hall's proof of the date of receipt is patently

incorrect: Not only did Plaintiff-Appellant Ursula Hall present affidavit and corroborating summary judgment proof of the date on which she received notice of the right to sue, but also, she won a summary judgment motion by which timeliness was

established as a matter of law. USCA5 at 77-85, 141-42. Moreover, the district court ordered that no further 12(b)(6) motions on timeliness, by the defendant, would be "allowed as it is clearly inapplicable to Plaintiff's complaints." USCA5 at 142.

The panel applies erroneous presumption law to its erroneous apprehension of fact when it finds that the because the "actual date of receipt is unknown," the court should "presume [a] receipt date[ ] ranging from three to seven days after the letter was mailed." Panel Opinion at p. 5. First, there is no sworn evidence in the record establishing the date on which the EEOC mailed the notice to Ursula Hall. Second, there is no sworn evidence that the EEOC "provided notice of her right to sue on September 29, 2004," as the panel opinion states. The date written on a notice on a line denoted "Date Mailed," without more, is not valid summary judgment evidence.

The record clearly presents the fact that Ursula Hall presented affidavit and corroborating evidence to rebut the inappropriate presumption about or establish the actual date on which the right to sue notice was received. USCA5 at 77-85. "It is error for the court to ignore [Ms. Hall's] affidavit." *Witt v. Roadway Express*, 136 F.3d 1424, 1430 (10th Cir. 1998). In *Witt*, the Tenth Circuit, which Circuit the Fifth Circuit followed in establishing the Fifth Circuit law applicable to this, then, first impression

matter, the court was presented with the exact same facts as in the instant case.[3] The claimant, Mr. Witt, was faced with a summary judgment motion on the matter of timeliness, just as

was Plaintiff-Appellant Ursula Hall. And he argued that his affidavit, stating the date on which he received his right to sue letter, rebuts any presumption and established a material fact issue, precluding summary judgment, just as Ursula Hall argued and continues to argue, and just as the district court originally held. The court agreed with claimant Witt, just as the district court and panel should have agreed with claimant Ursula Hall, in their *de novo* reviews.

The opinion totally and erroneously overlooks the court's summary judgment order [previously issued in] favor of Plaintiff-Appellant, determining the lawsuit timely, and completely misapprehends or overlooks the related matter of the law of the case doctrine.

As a matter of law, any receipt presumption that may arise, is rebuttable. *Witt* at 1429-30. "Because the presumption is rebuttable, however, evidence denying receipt creates a credibility issue that must be resolved by a trier of fact." *Witt* at 1430 citing *Rosenthal v. Walker*, 111 U.S. 185, 193-94, 28 L. Ed.

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[3] "As this is a matter of first impression in this circuit, we look to other federal courts for guidance..." *Taylor* at 379. The principal citation for this guidance was *Lozano v. Ashcroft*, 258 F.3d 1160, 1164 (10th Cir. 2001). *Lozano* cites to *Witt v. Roadway Express*, 136 F.3d 1424, 1429-30 (10th Cir. 1998).

395, 4 S. Ct. 382 (1884); *Anderson v. United States*, 966 F.2d 487, 491-92 (9th Cir. 1992); 9 Wigmore, Evidence § 2519 (Chadbourn rev. 1981 and Best Supp. 1997). Just as in the *Witt* case, wherein the court found "Mr. Witt has presented evidence which could reasonably be found to rebut the presumption," so too did the district court in the instant case, by it summary judgment ruling. *Witt* at 1430, USCA5 at 142.

The *Witt* opinion concludes as follows, on the matter of timeliness:

> The district court wrote, "Plaintiff has not presented any evidence to rebut the presumption or to establish the actual receipt date." *Witt*, 880 F. Supp. at 1461.
>
> 8
>
> On the contrary, Mr. Witt has done just that. It was error for the court to ignore Mr. Witt's affidavit. We reinstate his Title VII claim against the Teamsters and Warren Stevens.

Witt v. Roadway Express, 136 F.3d 1424, 1430 (10th Cir. 1998). The exact same result should obtain for Plaintiff-Appellant Ursula Hall. It is error to ignore Ms. Hall's affidavit. Id. Equally important, if not more important, it is error for the panel to overlook, or ignore, the factual reality that the district court issued an order in favor of Ursula Hall and timeliness, on Defendant Continental's motion for summary judgment, wherein the sole issue was timeliness. The district court's ruling on summary judgment also establishes a fact issue, precluding summary judgment, on the matter of timeliness. USCA5 at 142.

Undeniably, as a matter of well-established law, a partial summary judgment, such as that rendered by the district court in Plaintiff-Appellant Hall's favor, is a pretrial adjudication that certain issues are deemed established for trial of the case. *FDIC v. Massingil*, 24 F.3d 768, 774 (5th Cir. 1994), supplemented on reh'g, 30 F.3d 601 (5th Cir. 1994). The adjudication is akin to a preliminary order that resolves the matter before trial. 1946 Notes to F.R.C.P. 56. By summary judgment order, based upon valid summary judgment evidence, the district court determined that Ursula's lawsuit was timely filed. USCA5 at 142. Defendant Continental Airlines made no objections to the challenge of summary judgment under either F.R.C.P. 59(e) or F.R.C.P. 60(b), as the law requires. Rather, the Defendant re-urged the exact same issues, in an exactly similar summary judgment motion, and the court erroneously found the suit untimely in derogation of the law of the case doctrine.

9

The opinion erroneously misapprehends or overlooks the entire matter of discrimination law to which the Appellant's brief was devoted: retaliation based upon sex discrimination, retaliation discrimination, and related matters of prematurity.

In absolute misapprehension of the relevant law and facts, the panel opinion fails to mention the claimant's claims for sex discrimination and retaliation, in its Title VII discussion section. The "Discussion" section allegedly covering the Title VII claims fails to mention the word retaliation. In reviewing the entire evidence on the matter, the panel ought to be left with the definite and firm

conviction that a mistake has been committed; there is "clear error" in the panel opinion.

Effectively, the panel opinion completely and entirely overlooks the Plaintiff-Appellant Ursula Hall's entire brief, which brief is devoted largely to the matter of retaliation, premised upon the properly charged claim of sex discrimination, specifically, sexual harassment. One third of page 5, namely Section B, and all of page 6 and 7 of the panel opinion are wholly irrelevant. The only claims briefed relate to the timeliness of the Title VII claims of sex discrimination and retaliation discrimination. However, the panel opinion does not include any analysis of the substantive Title VII discrimination matters because the opinion erroneously deems the claims untimely.

The vague references to the same, in the "Facts and Proceedings" section of the panel opinion, all reflect misapprehension and neglect of the actual facts. Presumably, because the only facts upon which the court based its holding on the matter of timeliness and Title VII have been discussed herein, the Plaintiff-Appellant has met her

duty to point out with particularity the ways in which the panel opinion misapprehends or overlooks the law and facts of this case.

Nonetheless, the Plaintiff-Appellant points out each of the following:

1. The specific work product, or alleged lack thereof, for which Plaintiff-Appellant was fired, is confined to work produced during the

period of March 25-31, 2003, according to the termination letter. USCA5 at 470. Therefore, an alleged matter of "poor performance" in February 2002 is factually irrelevant; "after-acquired" evidence cannot defeat an employer's liability for a rights violation. *Mc Kinnon v. Nashville Banner Publishing Co.* 513 US 352, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995); also see USCA5 at 772.

2. Furthermore, undeniably, Ursula Hall received an "on target" overall rating for the period of [January] 1, 2002 – July 1, 2002. [USCA5 at 877-78.] "On Target (OT) employees contribute to the organization and meet all performance standards. These employees are recognized as being essential to their job function. They are valued team members and individual contributors." USCA5 at 874. Therefore, even if the panel opinion's erroneous statements about the events of February and May 2002 were correct they are irrelevant.
3. Further, and very significantly, the alleged, irrelevant events of February and May 2002, relate to a "Coaching Report." [USCA5 at 388-89.] A "coaching report" is a method of relating the contents of relating "second letters" to correspondence managers; "coaching is not tantamount to counseling. USCA5 at 815. Every single correspondence manager in the department had a least one passenger complaint [USCA5 at 797]; no other person in the department was ever fired for such. As of February 2003, all but two

correspondence managers had "second letters." The "second letters," or "seconds," were discussed with correspondence managers through "coaching reports" and were merely a part of one's "overall performance rating." USCA5 at 797; also see USCA5 at 771. Because Ursula's overall performance rating for the periods from February to May 2002 was "on target," any events during those periods cannot be reasonably said to reflect "poor overall performance."

4. There was no "on-target minus" rating issued by Supervisor Barrow in October 2002, indicating that Hall's performance was "on-target minus." USCA5 at 668-69. The only time at which Ursula Hall received a "negative" rating was on January 28, 2003, approximately one month after she reported Supervisor Barrow's sexual harassment. USCA5 at 874. And that retaliatory, negative rating of January 28, 2003, was reversed. Id.
5. The tape-recorded meeting with Supervisor Barrow was recorded with Barrow's permission, specifically because she refused to allow Ursula to attend the meeting with a live witness, as several of the company's of the employee procedure documents recommended. The meeting was not postponed; Hall did not refuse to meet with Barrow in connection with the taper recorded meeting at all. USCA5 at 893. A subsequent, unrelated, voluntary meting was suggested by Judy Dyar, unbeknownst to me at the time, to discuss communication skills. USCA5 at 891.

Plaintiff-Appellant Ursula Hall sought to record the meeting because she was, by then, terrified of Supervisor Barrow's destructive behavior. Near the time of the tape-recorded meeting, Plaintiff-Appellant Ursula Hall submitted a written resignation to Supervisor Barrow, in direct response to her sexual and workplace

harassment. Upon receiving notice of Ursula's resignation, Department Director Judy Dyar refused to accept it, offered the opportunity to retract it, and offered Ursula early vacation so that she could reconsider her resignation. USCA5 at 831-32.

6. Plaintiff-Appellant Ursula Hall did not "object" to meeting with Supervisor Barrow in December 2002.
7. There was no complaint about the quality of Ursula's customer service in December 2002. Passenger Bowler's complaint, of December 2002, was in response to a letter received from and written by a different manager, who was not fired, because of the poor customer service she provided, or the resulting "second letter" he sent. USCA5 817-19.

As of February 2003, all but two Correspondence managers had "second letter." The "second letters" were handled through "coaching reports" and were merely a part of one's "overall performance rating." USCA5 at 797; also see USCA5 at 771. Because Ursula's final, overall performance rating for the periods July 2002- January 2003 was "on target," any events during those periods

cannot be reasonably said to reflect "poor overall performance."

8. Defendant Continental Airlines admitted that Plaintiff-Appellant Ursula Hall submitted a valid, oral complaint of sexual harassment on December 16 and December 18. USCA5 at 741. Hall did not merely complain of "Barrow's numerous written communications and e-mails which she felt were micromanaging," as the panel opinion states. Panel Opinion at p.2.

9. There is no valid evidence in the record that Planitiff-Appellant Ursula Hall ever committed the misconduct about which she was accused on April 25, 2003, all of which allegedly related to work completed between the dates of March 25-31, 2003. See Panel Opinion at 3; USCA5 660-65. In fact, at the very least, there was a material dispute on the matter of misconduct. After a hearing on the matter of the alleged "misconduct," The Texas Workforce Commission found Ursula was not guilty of the alleged misconduct. Defendant Continental appealed the decision against it and the Appeal was denied. Defendant Continental did not seek further review of the agency finding that Ursula committed no misconduct. USCA5 at 682-86. As a matter of law, the "highly probative" agency finding should preclude summary judgment. *Smith v. Universal Services, Inc.*, 454 F.2d 154, 157 (5th Cir. 1972).
10. The panel opinion completely neglects and / or misapprehends the law of the case doctrine and the arguments on prematurity of

summary judgment. The panel ought to be left with the definite and firm conviction that a mistake has been committed; there is "clear error" in the panel opinion.

11. If properly viewed in context, Plaintiff-Appellant Hall's "further complaint" of "workplace harassment" and "retaliation" together with her previously lodged complaint of sexual harassment, clearly indicate a material dispute precluding summary judgment on the matter of Title VII discrimination. In fact, Gigi Jensen's response, and thus Continental's response, to Ursula's apparently well-founded complaint of "workplace harassment" and "further retaliation" was: you're fired. See Appendix, Tab 2.

14

§ 2000e-3 of Title VII makes retaliation an unlawful employment practice. 42 U.S.C. §2000e-3. Plaintiff-Appellant Ursula Hall made an additional complaint, of retaliation, supplementing her already lodged complaint of sexual harassment, to the same "Director, Human Resources, Reservations Division," Gigi Jensen. A written complaint of "workplace harassment" and "fear" of "further retaliation" based upon the cited "*Working Together Guidelines,* Continental's Comittment [sic] in the Workplace, Equal Employment Opportunity, Reporting Harassment (Sexual or Otherwise)," implicitly communicates opposition. USCA5 at 660. The following quoted reference certainly, at least implicitly, communicates opposition, *especially* given that Plaintiff-Appellant believed that

the investigation into her Supervisor's conduct was ongoing, "Continental Airlines expressly prohibits retaliation against any person filing a complaint of harassment or against any person participating in an investigation." Id. At the very least, this written complaint, taken in context, precludes summary judgment.

Prayer

Plaintiff-Appellant Ursula Hall prays that this panel restore the case to the calendar for rebriefing, resubmission and argument. Alternatively, Plaintiff-Appellant Ursula Hall prays that this panel reverse and remand for a new trial, as the appropriate action for this case.

Respectfully submitted,
__/s/ Ursula Hall_____
Ursula A. Hall, *Pro Se*
Post Office Box 233
Houston,Texas 77001-0233
Telephone: (713)440-6900
Telecopier: (713)440-6000
E-mail:uah@email.msn.com

Certificate of Service

I hereby certify that the foregoing petition was served upon Defendant Continental Airlines by

depositing the same in the United States mail, first class, in an envelope addressed: Louis K. Obdyke, IV, Continental Airlines, 1600 Smith St, 41st Floor, HQSLG, Houston, Texas 77002, and an envelope addressed: Danielle K. Herring, Littler Mendelson, P.C., 1301 McKinney Street, Suite 1900, Houston, Texas 77010-3031 on this the 26th day of November 2007.

__/s/ Ursula Hall_____

[**From:** Jensen, Gigi]
To: 'Ursula A. Hall'
Sent: May 7, 2003 9:16 AM
Subject: RE: Complaint Resolution

Hi Ursula,

As I read your letter to me, I think all the issues you raise were addressed at that meting.

> -----Original Message-----
> **From:** Ursula A. Hall [mailto:uah@msn.com]
> **To:** Jensen, Gigi
> **Sent:** May 6, 2003 5:06 PM
> **Subject:** RE: Complaint Resolution
>
> Gigi,
>
> Am I to take it that the response to my *Complaint* is my firing, announced at the meeting you reference?
>
> Thanks,
> Ursula

-----Original Message-----
From: Jensen, Gigi
To: 'Ursula A. Hall'
Sent: May 2, 2003 10:41 AM
Subject: RE: Complaint

Ursula,

Thanks for your message. I understand that your meeting with your management team has been re-scheduled for today. The results of the investigation will be shared with you at that time. You will have the opportunity to review your personnel file and will be able to have copies of anything in the file. You will also be provided with a copy of the Working Together Guidelines.

In regard to Investigatory Suspensions, the Guidelines say that suspensions will "usually" last no more than five days. Our goal is to ensure that all information is reviewed in detail. Occasionally that may require additional time. In this case, though, your meeting has been rescheduled within the usual five business days.

Thanks.

-----Original Message-----
From: Ursula A. Hall [mailto:uah@msn.com]
To: Jensen, Gigi
Sent: Wednesday, April 30, 2003 5:36 PM
Subject: RE: Complaint

Hi Gigi,

Can you tell me when I might be able to anticipate your follow up?
(I apologize if you received this message twice.)

5/8/2003

-----Original Message-----
From: Ursula A. Hall [mailto:uah@msn.com]
To: Jensen, Gigi
Sent: Wednesday, April 30, 2003 5:24 PM
Subject: RE: Complaint

Hi Gigi,

Can you tell me when I might be able to anticipate your follow up?

-----Original Message-----
From: Ursula A. Hall [mailto:uah@msn.com]
To: Jensen, Gigi
Sent: Wednesday, April 30, 2003 3:34 PM
Subject: RE: Complaint

Hi Gigi,

Thank you very much.

-----Original Message-----
From: Jensen, Gigi
To: 'Ursula A. Hall'
Sent: Wednesday, April 30,2003 11:37PM
Subject: RE: Complaint

Hi Ursula,

Wanted to confirm that I received your email. I will follow-up with you soon.

-----Original Message-----
From: Ursula A. Hall [mailto:uah@msn.com]
To: Jensen, Gigi
Sent: Tuesday, April 29, 2003 2:11 PM
Subject: RE: Complaint
Importance: High
Sensitivity: Confidential

Visit continental.com. Check-in, choose your seat, print your boarding pass and earn 1,000 OnePass bonus miles each time you book a trip.

http://www.continental.com

Visit continental.com. Check-in, choose your seat, print your boarding pass and earn 1,000 OnePass bonus miles each time you book a trip.

5/8/2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
December 11, 2007
Charles R. Fulbruge III Clerk

No. 07-20237
Summary Calendar

URSULA HALL

Plaintiff-Appellant

v.

CONTINENTAL AIRLINES INC

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

Before KING, DAVIS, and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:
\s\ E. B. Clement
United States Circuit Judge
REHG-2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
ENTERED
July 11, 2005
Michael M. Milby, Clerk of Court

URSULA HALL	§	
Plaintiff,	§	
	§	
	§	
v.	§	C.A. No. H-05-0158
	§	
CONTINENTAL AIRLINES, INC.		
Defendant	§	
	§	

ORDER

Before this court is a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which was filed by Defendant Continental Airlines Inc. As this motion invites the court to consider matters outside the pleadings, the court will treat it as one for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Fed. R. Civ. Proc. 12(b); *Hickey v. Arkla Indus., Inc.*, 615 F.2d 239, 250 (5th Cir. 1980). The court will allow the parties 10

days from the date of the order to supplement the record and submit affidavits or other relevant evidence on this matter. Fed. R. Civ. Proc. 56(c).

The Clerk of the Court shall enter this order and provide a true copy to the respective parties.

SIGNED at Houston, Texas this 11th day of July, 2005.

\s\ Mary Milloy

MARY MILLOY
UNITED STATES MAGISTRATE JUDGE

Unites States District Court
for the
Southern District of Texas, Houston Division

Ursula Hall,	:	: Civil Action No. H-05-0158
Plaintiff,	:	
vs.	:	
Continental Airlines Inc., Defendant	:	
	:	Jury

Declaration Under Penalty of Perjury of Ursula Hall in Opposition to [Defendant's First Motion for] Summary Judgment

STATE OF TEXAS §
HARRIS COUNTY §

"I, Ursula Hall, the undersigned declarant, am competent to make this affidavit; each and every fact stated herein is grounded in observation and firsthand personal experience.

"Attached are true and correct copies of the all of the correspondence, and proof of mailings, I have ever received from the Texas Workforce Commission, Civil Rights Division, and the United States Equal

Employment Opportunity Commission, in connection with filing deadline for the claim that is the subject of this action.

"On October 21, 2004, I received the first and only 'Notice of Suit Rights' I have ever received from the United States Equal Employment Opportunity Commission. I received the notice in an envelope bearing the postmark date October 19, 2004, as the attached copy of the envelope indicates. The notice was accompanied by a letter, dated October 19, 2004, written by Ronald G. Wideman, State and Local Coordinator, U.S. Equal Employment Opportunity Commission, Houston District Office.

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"Earlier, on September 27, 2004, I received an 'EEOC Review Notice' from the Texas Workforce Commission, Civil Rights Division. The notice was dated September 16, 2004, a date that preceded the state commission's receipt of my response to the defendant's position statement.

"On October 11, 2004, a date within the applicable fifteen-day deadline, I filed a 'Review Request' with the United States Equal Employment Opportunity Commission. The Review request was forwarded to the Commission by facsimile and certified mail, return receipt requested.

"The United States Equal Employment Opportunity Commission responded by forwarding the 'Notice of Suit Rights,' dated September 29, 2004 and the attached letter dated October 19, 2004; I received both documents on October 21, 2004.

"I, Ursula Hall, the *pro se* Plaintiff, and undersigned declarant, filed suit on January 18, 2005, within eighty-nine days (89) of receiving the United States Equal Employment Opportunity Commission's 'Notice of Suit Rights,' in accordance with the applicable law requiring filing within ninety days.

"I verify under penalty of perjury that the foregoing is true and correct."

EXECUTED on 21 July 2005.

___/s/ Ursula Hall_____

USCA5 78

Certificate of Service

I hereby certify that on this the 21st day of July, 2005, I electronically filed the foregoing Declaration Under Penalty of Perjury of Ursula Hall in Opposition to Summary Judgment with the Clerk of the Court *via* the CM/ECF system, which system will send an automatic notice of electronic filing *via* e-mail to defendant: Louis K. Obdyke, IV, Continental Airlines, 1600 Smith St; 41st Floor, HQSLG, Houston, Texas 77002, on this the 21st day of July 2005.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Houston District Office

Mickey Leland Federal Building
1919 Smith Street, 7th Floor
Houston, TX 77002-8049
(713)209-3320
TTY (713)209-3439
FAX (713) 209-3381

Ursula Hall
P.O. Box 233
Houston, TX 77001

Re: Charge Number 31C 2004 00537
Continental Airlines, Inc.

Dear Ms. Hall

On September 16, 2004, the Texas Workforce Commission, Civil Rights Division, issued you a Right for Civil Action regarding the referenced charge. This document authorized you to file a petition in state court within 60 days of receipt. It advised you to request a review of your case with [sic] 15 days. This date would have been about October 1, 2004.

Your letter dated October 11, 2004, and received on October 13, 2004, by this office requesting a review of your case was received after we had issued a Notice of Right to Sue. This notice gave you ninety days to file in federal court. As a matter of routine, this office reviews all cases received from the Texas Workforce Commission. Therefore, prior to receiving your request the case file was reviewed by a senior investigator. Based on the documentation in the case file, the Equal Opportunity Commission concurred with the investigation conducted by the Texas Workforce Commission.

We regret that we cannot be of any further service. However, you may contact a private attorney and file in court with the required time frames identified. If you intend to file in court, you may also request a copy of the case file, with [sic] 90 days of September 29, 2004.

If you have any question regarding this matter, you may contact me at (713)209-3332.

Sincerely,

/s/ Ronald G. Wideman 10/19/04
Ronald G. Wideman
State and Local Coordinator

USCA5 80

EEOC Form 161 (3/98)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To: Ursula A. Hall P O Box 233 Houston, TX 77001	From: Houston District Office 1919 Smith St, 7th Floor Houston, TX 77002

☐ On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No	EEOC Representative	Telephone No.
31C-2004-00537	Ronald G. Wideman, State and Local Coordinator	(713)209-3332

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

☐ The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.
☐ Your allegations did not involve a disability as defined by the Americans With Disabilities Act.
☐ The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.
☐ Your charge was not timely filed with EEOC; in other words, you waited too long after the date(s) of the alleged discrimination to file your charge
☐ Having been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve

your charge.

☐ While reasonable efforts were made to locate you, we were not able to do so.

☐ You were given 30 days to accept a reasonable settlement offer that affords full relief for the harm you alleged.

☐ The EEOC issues the following determination: Based on its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent IS In compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

☒ The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

☐ Other (briefly state)

-NOTICE OF SUIT RIGHTS -

(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this notice**; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

On behalf of the Commission

September 29, 2004
(Date Mailed)

/s/ Ronald G. Wideman
Michael C. Fetzer,
Acting Director

September 29, 2004
(Date Mailed)

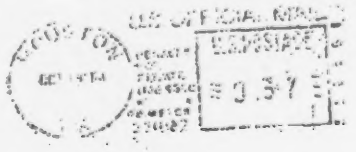
cc: Robin E. Curtis, Attorney
CONTINENTAL AIRLINES, INC
1600 Smith Street-41st Floor,
Legal Department-HQSLG
Houston, TX 77002

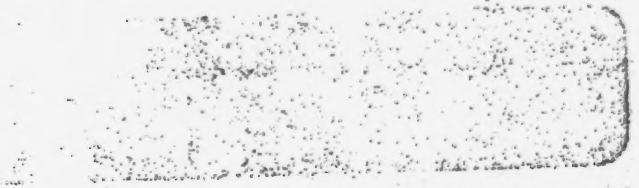
Texas Workforce Commission
Civil Rights Division
P.O. Box 13006
Austin, Texas 78711-3006V

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
HOUSTON DISTRICT OFFICE
1919 SMITH STREET - 7TH FLOOR
HOUSTON, TX 77002-8049

Official Use
Penalty For Private Use $300

INTAKE





77001-0233

U.S. Equal Employment Opportunity Commission
Houston District Office
1919 Smith Street - 7th Floor
Houston, TX 77002-8049

Official Use
Penalty for Private Use

INTAKE

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TX

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PENALTY
FOR
PRIVATE
USE $300
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PB METER
2311187

U.S. POSTAGE
≈0.37

URSULA A. HALL

October 11, 2004

Houston EEOC
1919 Smith Road, 7th Floor
Houston, Texas 77002
First Class, United States, Certified Mail, Return Receipt Requested 7002 2410 0000 9641 4006

Re: TWCCRD Charge No. 1A40136-H, *Ursula A. Hall v. Continental Airlines, Inc.*, Review Request

Dear Sirs / Mesdames:

By this writing, I hereby request EEOC Review of the final decision issued in my case, by the Texas Workforce Commission, Human Rights Division, and received on September 27, 2004.

Thank you in advance for your fair and just review of my claims.

Respectfully,
/s/ Ursula Hall
Ursula A. Hall

Attachments (2):
Dismissal and Notice of Right to File a Civil Action
United States Postal Service Delivery Confirmation

cc: EEOC Houston *via* Facsimile (713)209-3381

UNITED STATES POSTAL SERVICE
Track & Confirm
Current Status
You entered 7002 2410 0004 2637 6855
Your item was delivered at 2:14 pm on September 27, 2004 in HOUSTON, TX 77201.
Notification Options
Track & Confirm FAQs
TEXAS WORKFORCE COMMISSION
P.O. Box 13005
AUSTIN TX 78711
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DISMISSAL AND NOTICE OF RIGHT TO FILE A CIVIL ACTION

To: Ursula A. Hall	From: Texas Workforce Commission
P O Box 233	1919 Smith St, 7th Floor
Houston, TX 77001	Houston, TX 77002

TWCCRD Charge No.	EEOC Charge No.	TWCCRD Representative
1A40136-H	31CA400537	Janet G. Quesnel

THE TWCCRD IS CLOSING THIS CHARGE FOR THE FOR THE FOLLOWING REASON:

☐ The facts alleged in the charge fail to state a claim under any of the statutes enforced by the TWCCRD.

☐ Your allegations did not involve a disability as defined by the Americans With Disabilities Act or the Texas Commission on Human Rights Act.

☐ The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

☐ Having been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge.

☐ While reasonable efforts were made to locate you, we were not able to do so.

☐ You were given 30 days to accept a reasonable settlement offer that affords full relief for the harm you alleged.

☐ The TWCCRD issues the following determination: Based on its investigation, the TWCCRD is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding

is made as to any other issues that might be construed as having been raised by this charge.

[x] The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

[ ] Other (briefly state)

NOTICE OF RIGHT TO FILE A CIVIL ACTION

Pursuant to Sections 21.208, 21.252 and 21.254 of the Texas Labor Code, as amended, this notice is to advise you of your right to bring a private civil action in a state court in the above referenced case. **PLEASE BE ADVISED THAT YOU HAVE SIXTY (60) DAYS FROM THE RECEIPT OF THIS NOTICE TO FILE A CIVIL ACTION.** (The time limit for filing suit based on a federal claim may be different.)

EEOC REVIEW NOTICE

AS YOUR CHARGE WAS DUAL FILED UNDER TITLE VII OF THE CIVIL RIGHTS ACT/AGE DISCRIMINATION IN EMPLOYMENT/AMERICANS WITH DISABILITIES ACT, WHICH ARE ENFORCED BY THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC), YOU HAVE THE RIGHT TO REQUEST EEOC REVIEW OF THIS FINAL DECISION ON YOUR CASE. TO SECURE A REVIEW, YOU MUST REQUEST IT IN WRITING WITHIN FIFTEEN DAYS OF THE RECEIPT OF THIS NOTICE. YOUR REQUEST SHOULD BE SENT TO THE U.S. EQUAL EMPLOYMENT OPPRTUNITY COMMISSION AS APPROPRIATE.

[ ] Dallas EEOC	[x] Houston EEOC	[ ] San Antonio EEOC
207 South Houston St Dallas, TX 75202	1919 Smith Road, 7th Floor Houston, TX 77002	5410 Fredricksburg Rd #200 Mockingbird Plaza, Plaza II San Antonio, TX 78229

On behalf of the Commission

/s/ Raymond Hammarts 9/16/04

For. Vickie Covington, SPHR Date
Interim Executive Director
Civil Rights Division
Texas Workforce Commission

cc: Robin E. Curtis, Attorney
CONTINENTAL AIRLINES,INC
1600 Smith Street-41st Flr -HQSLG
Houston, TX 77002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF TEXAS
HOUSTON DIVISION

URSULA HALL	§	
Plaintiff,	§	
	§	
v.	§	C.A. No.
	§	H-05-0158
	§	
CONTINENTAL AIRLINES, INC.		
Defendant	§	

ORDER GRANTING MOTION FOR MORE DEFINITE STATEMENT [AND DENYING DEFENDANT'S FIRST MOTION FOR SUMMARY JUDGMENT]

The above-referenced case has been referred by United States District Judge Vanessa D. Gilmore for full pretrial management, pursuant to 28 U.S.C. § 636(b)(1)(A) and (B). (Docket Entry #11).

The "Motion For A More Definite Statement or Alternatively Dismissal" filed by Defendant Continental Airlines is **GRANTED**. (Docket entry #29).

Following the scheduling conference, held on October 7, 2005, a number of amended pleadings and dispositive motions have been filed. To assist the court in a more efficient adjudication of the pending claims and defenses, it is ORDERED that

1. All initial disclosures, under Rule 26 of the Federal Rules of Civil Procedure, must be completed **on or before December 1, 2005.**
2. Plaintiff is to file a Second Amended Complaint, styled in that manner, in which she sets out the factual basis for her allegations that she was discriminated against on the basis of her sex/race, subjected to harassment, retaliated against for complaining of that unlawful treatment, and any adverse employment action that she allegedly suffered. Apparently, Plaintiff is also pursuing state law claims for defamation,
assault, and "negligent hiring/retention". As to those state law claims, Plaintiff is ORDERED to provide notice to Defendant as to the factual basis for those claims.
3. Plaintiff's Second Amended Complaint is to befiled **on or before**

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December 15, 2005.

4. All other pending motions are **DENIED**, at this time, without prejudice to reurging after the amended pleadings have been filed.

5. Defendant is ORDERED to take any necessary discovery before filing a comprehensive dispositive motion under Rule 56, or Rule 12 (b)(1).
6. Pursuant to the Scheduling Order entered on October 13, 2005, Defendant's dispositive motion is due **on or before July 15, 2006.**

No further motions to dismiss under Rule 12 (b)(6), will be allowed as it is clearly inapplicable to Plaintiff's complaints.

The Clerk shall enter this Order and provide a true copy to all counsel of record.

SIGNED at Houston, Texas, this 18th day of November, 2005.

/s/ Mary Milloy .
MARY MILLOY
UNITED STATES MAGISTRATE JUDGE

Performance History

Ursula Hall (95816)

Date	Rating	Description	Grade	Title
01/01/2003	2	On Target	40	Customer Care Manager
07/01/2002	2	On Target	40	Customer Care Manager
04/01/2002	2	On Target	40	Customer Care Manager
01/01/2002	2	On Target	40	Customer Care Manager
07/01/2001	2	On Target	40	Customer Care Manager
01/01/2001	00	Unspecified	40	Customer Care Manager

Employee Performance Rating
Confirmation

EMPLOYEE GENERAL INFORMATION

Employee Name: Hall, Ursula Antoinette

Employee Number: 95816

Title: Customer Care Manager

Pay Grade: 40

1/1/2003 PERFORMANCE RATING

July 2-December 31

2.5-On-Target Minus

On Target Minus (OT-) employees show ability for successful performance after achieving some improvement. They meet most of the performance standards required for their job functions however, some essential job requirements are not met. Overall, these employees have the potential to add value to the organization but must show improvement in the next six months.

Productivity = reason for the rating

7/1/2002 PERFORMANCE RATING

2-On Target

On Target (OT) employees contribute to the organization and meet all performance standards. These employees are recognized as being essential to their job function. They are valued team members and individual contributors.

1/28/2003 12:23:18PM

TEXAS WORKFORCE COMMISSION
Appeal Tribunal Decision

CASE HISTORY: By determination dated July 11, 2003, the claimant was disqualified under Section 207.044 of the Texa Unemployment Compensation Act beginning June 15, 2003, and continuing until the claimant returns to employment and either works for six weeks or earns wages at least equal to six times the claimant's weekly benefit amount because the claimant was discharged from the last work because of misconduct connected with the work. The claimant appealed.

It was also ruled that there would be no chargeback to the employer's account as a result of this claim.

FINDINGS OF FACT: Prior to filing an initial claim for unemployment benefits with the effective date of June 15, 2003, the claimant last worked from August 3, 1996, through May 2, 2003, as a customer care manager for the named employer, an airline.

The evidence in this matter was in dispute. Accordingly the findings and conclusions of the Tribunal are based on the most plausible evidence presented by the parties.

The claimant was discharged because the employer determined that the clamant had failed to properly close several of her cases. In December 2002, the employer was going to place the claimant under a

period of performance improvement, but rescinded after a review of the facts. Between December 2002 and the date the claimant was suspended, she was made aware of only one problem. The complaint was resolved and the claimant was determined to be not at fault. After that problem, until the claimant was placed on administrative leave on April 29, 2003, the claimant was not notified that her performance was at issue.

CONCLUSIONS: Section 207.044 of the Act provides that an individual who was discharged for misconduct connected with the individual's last work is disqualified for benefits until the individual has returned to employment and worked for six weeks or earned wages equal to six times the individual's benefit amount.

Section 201.012 of the Act defines "misconduct" to mean mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing or malfeasance, intentional violation of a law, or violation of policy or rule adopted to ensure the orderly work and safety of employees, but does not include an act in response to an unconscionable act of an employer or superior.

The conflict in testimony in this case is statements by the employer that several cases were not properly closed and that the claimant had falsified documentation by stating that the customers had been contacted when they were not. While the claimant testified that she never knowingly closed a case improperly, and that all cases noted as closed had been properly closed. As the employer failed to

provide physical evidence or testimony from customers to the stated charges and the claimant received no warnings prior to her discharge, in order to correct any problems, the claimant's testimony that she did not close cases improperly will take precedence in this decision.

The following decision has been adopted as precedent by the Commission in Section MC3005.05 of the Appeals Policy and Precedent Manual.

Appeal No. 1456-CA-77. Where a claimant has performed her work to the best of her ability, her inability to meet the employer's standards or inability to perform the work to the employer's satisfaction does not constitute misconduct connected with the work.

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TEXAS WORKFORCE COMMISSION
Appeal Tribunal Decision

Appeal No.: 487147-1
Page No: 3

The above-cited precedent stands for the proposition that the employer carries the burden of persuasion to prove misconduct connected with the work, and that an inability to meet the employer's standard does not constitute misconduct. In this case, the evidence presented indicates that he claimant did not fail to properly close cases and that she was unaware that her employer had a problem with her performance. As such, this Appeal Tribunal finds that the claimant

was discharged for reasons other than misconduct connected with the work. A separation under these circumstances will not disqualify the claimant under Section 207.044 of the Act. The determination appealed from will be reversed...

/s/ Gay L. Honeywell
Hearing Officer

glh

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

URSULA HALL,	§	
	§	
Plaintiff	§	
	§	
v.	§	CIVIL ACTION NO. H-05-0158
	§	
CONTINENTAL AIRLINES, INC.,		
	§	
Defendant	§	

MEMORANDUM AND RECOMMENDATION ON DEFENDANT'S [SECOND] MOTION FOR SUMMARY JUDGMENT

This matter was referred by United States District Judge Vanessa D. Gilmore, for full pretrial management, under 28 U.S.C. § 636 (b)(1)(A) and (B). (Docket Entry # 11). Before the court is the motion by Defendant Continental Airlines, Inc. ("Defendant," "Continental") for summary judgment. (Defendant's Motion for Summary Judgment ["Motion"], Docket Entry # 51). Plaintiff Ursula Hall ("Plaintiff," "Hall") filed a response to the motion, and Defendant has replied to her arguments. (Plaintiff's Response to Defendant's Motion for Summary Judgment ["Response"], Docket Entry # 52; Defendant's Reply to Plaintiff's Response to Motion for Summary Judgment ["Reply"], Docket Entry # 54). After considering the pleadings, the evidence submitted, and the

applicable law, it is RECOMMENDED that Defendant's motion for summary judgment be GRANTED, and that this case be DISMISSED.

Background

In this action, Ursula Hall complains that, while employed with Continental Airlines, Inc., she was subjected to unlawful discrimination on the basis of her race and sex, in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. §§ 2000(e) *et seq.*, and

Sections 1981 and 1983 of the Civil Rights Acts of 1866 and 1871, as amended ("Section 1981," "Section 1983"). (Response at 1). She also claims that, because she complained of this unlawful treatment, the company began to retaliate against her, and ultimately, fired her. (*Id.*). Finally, she alleges that, under state law, Continental is liable to her for assault, defamation, and "negligent hiring and retention." (*Id.*; *see* Plaintiff's Second Amended Complaint ["Complaint"], Docket Entry # 34, at 1).

Plaintiff was hired by Continental, in 1996, as an airport ticket agent. (Motion at 1). In October 2000, Hall's duties changed and she became a "Customer Care Manager." (Response at Exhibit ["Ex."] 4). In that position, she received, investigated, and responded to customer complaints. (*Id.* at Ex. 5; Motion at 1). Plaintiff alleges that, in March 2002, her supervisor, Joycelyn Barrow ("Barrow"), began to harass her by making unsolicited, sexually explicit gestures and comments, and that she physically assaulted her. (Complaint at 2). Hall claims that when she complained about Barrow's conduct,

Continental took no appropriate remedial action. (*Id.* at 2-3). Plaintiff alleges that, instead, she "was progressively punished, and ultimately fired, in retaliation for" her complaints. (*Id.* at 2). Hall contends that, in March 2002, her superiors began to enforce policies and procedures against her that they did not enforce against other similarly situated male Caucasian employees. (*Id.*). It is undisputed that, on May 2, 2003, Hall was terminated. On that date, Continental informed her that she was discharged because of her "overall performance record" and "the severity of her actions in inaccurately representing her contact with customers and taking credit for closing files that were not resolved." (Motion at Ex. 2 ["Plaintiff's Deposition"] at 156-57, Ex. 8).

On May 21, 2004, Hall filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). In her complaint, she alleged that Continental had discriminated against her on the basis of her sex, and had terminated her in retaliation for complaining about that conduct. (Plaintiff's Deposition at Ex. 9). On September 29, 2004, the EEOC issued a right to sue letter, and, on January 18, 2005, Hall filed this action. (*Id.* at Ex. 11). Defendant now moves for summary judgment. From a review of the pleadings, the evidence submitted, and the applicable law, the court concludes that the Defendant's motion should be granted.

Standard of Review

Summary judgment is appropriate if no genuine issue of material fact exists and the moving

party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Under Rule 56(c), the moving party "bears the initial burden of 'informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.'" *Taita Chem. Co., Ltd. v. Westlake Styrene Corp.*, 246 F.3d 377, 385 (5th Cir. 2001) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see Malacara v. Garber*, 353 F.3d 393, 404 (5th Cir. 2003). The party moving for summary judgment "'must demonstrate the absence of a genuine issue of material fact,' but 'need not negate the elements of the nonmovant's case.'" *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)); *see Wallace v. Texas Tech University*, 80 F.3d 1042, 1047 (5th Cir. 1996). If the moving party fails to meet its initial burden, the motion for summary judgment must be denied, regardless of the non-movant's response. *See Kee v. City of Rowlett*, 247 F.3d 206, 210 (5th Cir. 2001); *Little*, 37 F.3d at 1075. When the moving party has met its Rule 56 burden, the nonmovant cannot survive a motion for summary judgment by resting merely

on the allegations in its pleadings. *See Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 349-50 (5th Cir. 2005); *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995). If the movant does meet its burden, the nonmovant "must 'go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial.'" *Boudreaux*, 402 F.3d at 540

(quoting *Little*, 37 F.3d at 1075); *see Izen v. Catalina*, 398 F.3d 363, 366 (5th Cir. 2005); *Taita Chem. Co., Ltd.*, 246 F.3d at 385. Further, the nonmovant "'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)); *see Boudreaux*, 402 F.3d at 540.

To meet her burden, the nonmoving party must present "significant probative" evidence indicating that there are issues of fact remaining for trial. *See Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000); *Conkling v. Turner*, 18 F.3d 1285, 1295 (5th Cir. 1994). In deciding a summary judgment motion, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see Taita Chem. Co., Ltd.*, 246 F.3d at 385. However, "'Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Stahl v. Novartis Pharms. Corp.*, 283 F.3d 254, 263 (5th Cir. 2002) (quoting *Celotex Corp.*, 477 U.S. at 322). If the evidence presented to rebut the summary judgment motion is only colorable or not significantly probative, summary judgment should be granted. *See Anderson*, 477 U.S. at 249-50; *Wheeler v. Miller*, 168 F.3d 241, 247 (5th Cir. 1999).

Discussion

As a threshold matter, a brief review of the actions Hall is actually pursuing in this suit is necessary. In her second amended complaint, Plaintiff sought recovery for race and sex discrimination, under the federal statutes, as well as under the Thirteenth Amendment to the United States Constitution. (Complaint at 1). In addition, she cl: imed violations of the state law on retaliation, assault, defamation, "negligent retention," and wrongful discharge. (*Id.*). Recently, however, Plaintiff clarified that her claims are limited to "discrimination pursuant to Title VII and Sections 1981 and 1983, retaliation pursuant to Title VII, defamation, assault, and negligent hiring and retention." (Response at 1). The court assumes then that, as those were the claims addressed in her response to Defendant's motion, they are the only actions she intends to pursue.[1] *See DIRECTV, Inc. v. Budden*, 420 F.3d 521, 525-26 (5th Cir. 2005); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 424 (5th Cir. 2000).

In its motion for summary judgment, Continental argues that all of Plaintiff's Title VII

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[1] In any event, the court can easily dispose of the abandoned claims. For example, the Thirteenth Amendment does not provide an independent cause of action for discrimination in employment. *See Martinez v. Bohls BearingEquip. Co.*, 361 F. Supp. 2d 608, 614 (W.D. Tex. 2005); *Doffoney v. Board of Trustees for Beaumont Indep. Sch. Dist.*, 731 F. Supp. 781, 782 (E.D. Tex. 1989). Further, the Texas law on retaliation is sufficiently similar to Title VII, so that if Plaintiff's Title VII retaliation claim fails on the merits, then the state law claim fails, as well. *See Pineda v. United Parcel Serv.*, 360 F.3d 483, 487 (5th Cir. 2004). Finally, Plaintiff has not alleged facts to support a common law claim of wrongful discharge, which, in Texas, is available only to employees who were required to perform an illegal act. *See Blase Indus. Corp. v. Anorad Corp.*, 442 F.3d 235, 239 (5th Cir. 2006); *see also Winters v. Houston Chronicle Publ'gCo.*, 795 S.W.2d 723,.723-24 (Tex. 1990).

claims, as well as her state law claims for assault and defamation, should be dismissed because they were not timely filed. (Motion at 17-25). Defendant also argues that Plaintiff's claim of racial discrimination, under Title VII, is barred for an additional reason—she failed to raise that allegation in her complaint to the EEOC. (*Id.* at 14). Further, Defendant contends that, even if any of her allegations are not time barred, Plaintiff has not raised a genuine issue of material fact on any of

them, so no trial on the merits is required. (*Id.* at 22-23). Finally, Defendant points out that Plaintiff cannot succeed on her Section 1983 claims because that law addresses only alleged discriminatory action at the hands of a state agent. *See Ballard v. Wall*, 413 F.3d 510, 518 (5th Cir. 2005). For these reasons, Defendant argues that a summary judgment is appropriate and this case should be dismissed.

Employment Discrimination Claims

In this action, Plaintiff claims that Defendant is liable to her under Title VII for race and sex discrimination, as well as for retaliation. In response, Continental contends that Plaintiff's Title VII claims are time barred and that, even if they were viable, those claims fail on the merits. Under Title VII of the Civil Rights Act of 1964, as amended, it is "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). However, before

one can pursue a Title VII claim in federal court, a claimant must first exhaust the available administrative remedies. *See Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378-79 (5th Cir. 2002). "Exhaustion occurs when the plaintiff files a timely charge with the EEOC and receives a statutory notice of right to sue." *Id.* at 379 (citing *Dao v. Auchan Hypermarket*, 96 F.3d 787, 788-89 (5th Cir. 1996)). Once a right to sue letter has been issued, a claimant has 90 days in which to file a civil action in federal court. *See id.* (citing *Nilsen v. City of Moss Point*, 674 F.2d 379, 381 (5th Cir. 1982) (citing 42 U.S.C. § 2000e-5(f)(1) (1994))). "This requirement to file a lawsuit within the ninety-day limitation period is strictly construed." *Id.*

Indeed, suits filed outside that 90-day period are deemed to be untimely and are subject to dismissal. *See id.* at 378-79; *Espinoza v. Missouri Pac. R.R. Co.*, 754 F.2d 1247, 1249 n.1 (5th Cir. 1985).

In this instance, the EEOC issued Hall a right to sue letter on September 29, 2004, but she did not file her lawsuit until January 18, 2005, more than one hundred days later. (Plaintiff's Deposition at Ex. 11). In support of its motion for summary judgment on this issue, Continental has provided evidence that it received a copy of the letter from the EEOC on October 1, 2004, two days after it was issued. (*Id.*). Plaintiff, on the other hand, has made no showing of the date on which she received the letter. In this circuit, a claimant need not actually receive a right to sue letter before the 90-day period begins to run. *See Taylor*, 296 F.3d at 379-80; *Espinoza*, 754 F.2d at 1250-51; *Hunter-Reed v. City of Houston*, 244 F. Supp. 2d 733, 740 (S.D. Tex. 2003). But, if a plaintiff does not name a specific date on which she received

the right to sue letter, and if the actual date of receipt is unknown, "a presumption of receipt is appropriate." *Taylor*, 296 F.3d at 380. In such circumstances, "courts have presumed various receipt dates ranging from three to seven days after the letter was mailed." *Id.* (citing *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 148 n.1 (1984) (applying three-day presumption based on Fed. R. Civ. P. 6(e)); *Lozano v. Ashcroft*, 258 F.3d 1160, 1164 (10th Cir. 2001); *Banks v. Rockwell Int'l N. Am. Aircraft Operations*, 855 F.2d 324, 326 (6th Cir. 1988)). In *Taylor*, the Fifth Circuit found that "[e]ven if we were to apply the maximum number of days that courts have allowed under the presumption of receipt doctrine, *i.e.*, seven days after the EEOC mailed the letter, Taylor's claim would still be considered untimely." *Id.* In fact, in that case, the Fifth Circuit concluded that Taylor's claims were properly dismissed, even though he filed them just one day after the 90-day period had expired. *See id.*

Here, allowing Plaintiff the generous seven-day presumption period, her deadline to file suit was no later than January 4, 2005. Granting every inference in her favor, Hall had until that day, and no longer, to file a complaint in federal court. This lawsuit, however, was not filed until January 18, 2005, two weeks after the 90-day period had expired. Because her complaint was filed more than 90 days after she is presumed to have received the right to sue letter, those Title VII claims are subject to dismissal, and summary judgment is appropriate for that reason.

Further, even had her Title VII claims been timely filed, Plaintiff's allegation of racial

discrimination is barred because she did not raise it in her complaint to the EEOC. (*See* Plaintiff's Deposition at Ex. 9). The Fifth Circuit has held consistently that "the scope of a Title VII complaint is limited to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Thomas v. Texas Dep't of Crim. Justice*, 220 F.3d 389, 395 (5th Cir. 2000); *accord Pacheco v. Mineta*, 448 F.3d 783, 792 (5th Cir. 2006). Here, Hall made no reference to discrimination on the basis of her race when she filed her action with the EEOC. At that time, she claimed only that she was discriminated against because of her sex, and that she had been retaliated against because she complained about sexual harassment. (*See id.*). In fact, in response to Defendant's motion, Plaintiff has made no argument that an investigation of race discrimination arises from the matters stated in her EEOC complaint. For this reason, as well, Plaintiff's race discrimination claim, under Title VII, is likewise barred.

Finally, even if Hall's Title VII claims were not otherwise precluded, they also fail on the merits. Although Plaintiff claims that she was the victim of discrimination based on her race and her sex, she has simply not met her burden to refute Defendant's summary judgment evidence. In its motion, Continental "'inform[ed] the district court of the basis for its motion, and identif[ied]

those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact,'" and has satisfied its burden of proof as movant. *See Taita Chem. Co., Ltd.*, 246 F.3d at 385. To survive a summary judgment, then, Plaintiff "must submit or identify evidence in the

summary judgment record . . . that designates specific facts showing there is a genuine issue of fact." *Smith v. United States*, 391 F.3d 621, 625 (5th Cir. 2004). "The nonmovant is also required to articulate the precise manner in which the submitted or identified evidence supports [her] claim." *Id.* Vague suggestions that there is evidence to support a claim is not sufficient to refute a competent motion for summary judgment. *See id.* (citing *Forsyth v. Barr*, 19 F.3d 1527, 1536-37 (5th Cir. 1994)). Here, in her response, Plaintiff did not discuss her race or sex discrimination claims, let alone point to evidence in support of them. Instead, the entirety of her response addresses only her claim of retaliation. As to her other claims, Plaintiff states merely that "[s]ummary judgment is improper in this case because there are genuine issues of fact on each element, of each of plaintiff's claims," and contends that "[t]he triable matter of retaliation is so intertwined with all of the Plaintiff's other claims that full, or final, summary judgment is inappropriate." (Response at 1, 7).

These conclusory statements are not sufficient to rebut Defendant's motion for summary judgment on this record. *See Smith*, 391 F.3d at 625. To preserve her claims of race and sex discrimination, Hall is required to make some showing sufficient to, at a minimum, raise a genuine issue of fact on the elements essential to her claims. *See Celotex Corp.*, 477 U.S. at 322; *Stahl*, 283 F.3d at 263. Among other things, to prove a claim of race or sex discrimination under Title VII, a plaintiff must provide direct evidence of discriminatory animus, or show that she was replaced by someone outside her protected class, or show that other, similarly situated employees were treated differently. *See Willis v. Coca-Cola*

Enterps., Inc., 445 F.3d 413, 420 (5th Cir. 2006); *Abarca v.*

Metropolitan Transit Auth., 404 F.3d 938, 941 (5th Cir. 2005); *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 384 n.3 (5th Cir. 2003). Here, Plaintiff fails to raise evidence that might establish any of these factors. Further, at her deposition, Hall testified that she did not know whether other similarly situated employees were treated any differently from the treatment she received. (Deposition at 146-50). Because she has not presented direct evidence of a discriminatory motive, or any evidence that suggests she was treated differently from similarly situated employees in nearly identical circumstances, Hall has not met her burden to establish a prima facie case of race or sex discrimination, and these claims should be dismissed. *See Smith v. Texas Dep't of Water Resources*, 818 F.2d 363, 366 (5th Cir. 1987).

In addition, with regard to a claim for sexual harassment, a plaintiff must show, among other things, that she was the victim of unsolicited sexual attention or advances. *See Harvill v. Westward Comm., L.L.C.*, 433 F.3d 428, 434 (5th Cir. 2005) (citing *Woods v. Delta Beverage Group, Inc.*, 274 F.3d 295, 298 (5th Cir. 2001)). Hall appears to base her sexual harassment claim on three incidents: (i) "Ms. Barrow bumped into my side in the employee break room (kitchenette) while talking about a pie so delicious she compared the taste of the pie to an orgasm"; (ii) "While I was upset and crying at work, Ms. Barrow asked me what was wrong and ran her fingers through my hair"; and (iii) "Although I once asked her out for dinner and/or a drink, Ms. Barrow asked me out for dinner and/or a drink one time." (Plaintiff's Deposition at 92, 96, 105-06). It is

well settled, however, that "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discriminat[ion] . . . because of . . . [plaintiff's protected status].'" *Oncale*, 523 U.S. at 80 (quoting 42 U.S.C. § 2000e-2(a)(1)); *see Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001). To establish a valid harassment claim, the plaintiff must present "more than a few isolated incidents of

[sexual] enmity." *Jones v. Barnhart*, 349 F.3d 1260, 1268 (10th Cir. 2003). "'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (quoting *Oncale*, 523 U.S. at 82); *see Burlington N. & Santa FeRy. Co. v. White*, __ U.S. __, 126 S. Ct. 2405, 2415 (2006). Here, granting every inference in her favor, the record holds no evidence that Hall was subject to anything more than a few "offhand comments," or one or two "isolated incidents" of questionable conduct, at most. Further, at her deposition, Plaintiff testified that Barrow never sexually propositioned her and never discussed sex, aside from the reference to a pie as "orgasmic," and a brief mention of a boyfriend. (Plaintiff's Deposition at 114). In short, Hall made no attempt to show that she was the victim of actionable sexual attention or advances, which is necessary to support her claim. *See Harvill*, 433 F.3d at 434. For this reason, as well, summary judgment is warranted on her sexual harassment claim.

Finally, Hall claims that she suffered race discrimination under Section 1981. Section 1981

protects the equal right of "[a]ll persons within the jurisdiction of the United States" to "make and enforce contracts" without respect to race. 42 U.S.C. § 1981(a). The Fifth Circuit permits the prosecution of Section 1981 claims that involve discrimination in at-will employment situations. *See Byers*, 209 F.3d at 425. "Claims of intentional discrimination brought under Title VII and Section 1981 require the same proof to establish liability." *Id.* at 422 n.1; *see Jones v. Robinson Property Group, L.P.*, 427 F.3d 987, 992 (5th Cir. 2005); *Raggs v. Mississippi Power & Light Co.*, 278 F.3d 463, 468 (5th Cir. 2002). So, to survive summary judgment on her Section 1981 claim, Hall must present direct evidence of discriminatory animus, or make some showing (i) that she was replaced by someone outside her protected class, or (ii) that similarly situated employees were

treated differently. *See Celotex Corp.*, 477 U.S. at 322; *Willis*, 445 F.3d at 420; *Wallace*, 80 F.3d at 1047-48. However, as discussed previously, Hall has made no attempt to show proof or even raise a fact issue as to any of these factors. Consequently, summary judgment is appropriate on her claim for race discrimination under Section 1981.

On this record, Plaintiff has not raised a genuine issue of material fact on any elements that are necessary to prevail on her claims of discrimination, based on race or sex, under Title VII, or race, under Section 1981. It follows then that she has not met her burden, as nonmovant, to rebut Defendant's motion, and summary judgment is appropriate on Plaintiff's Title VII and Section 1981 discrimination claims. *See Celotex Corp.*, 477 U.S. at 322; *Anderson*, 477 U.S. at 249-50; *Byers*, 209 F.3d at 422 n.1.

Retaliation

As discussed earlier, Plaintiff's retaliation claim, under Title VII, is precluded by her failure to file suit within 90 days of receiving the right to sue letter from the EEOC. However, even were it not, she could not succeed on the merits of that allegation. In her most recent complaint, Hall alleges that Continental retaliated against her for her action in opposing sexual harassment. (Complaint at 2). She claims that, beginning in March 2002, she "repeatedly reported [Barrow] for harassing behavior." (*Id.*). However, neither Plaintiff's complaint nor her response details any specific information about when she made these oral complaints, to whom they were made, or even the content of the complaints. Hall also alleges that, on April 29, 2003, she complained in a letter she directed to Jennifer "Gigi" Jensen ("Jensen"), Continental's Human Resource Director. (*Id.*). In this letter, Hall "complain[ed] of workplace harassment." (Response at Ex. 3). In particular, she told Jensen that her "superiors" had unfairly accused her of neglecting her work, had threatened to

fire her, and had placed her on probation. (*Id.*). In that letter, she also complained that her supervisors were not following Continental's published procedures in the disciplinary actions taken against her. (*Id.*). In her lawsuit, Hall alleges that Continental took no action to address her oral and written complaints, but instead retaliated against her by selectively enforcing policies and, ultimately, firing her. (Plaintiff's Deposition at 145; Response at 4-5).

In response to her allegation of unlawful retaliation, Continental first contends that neither Hall's oral complaints nor her written complaint are sufficient to establish a retaliation claim. (Motion at 15-16). In support of its argument, Continental claims: (i) that Hall's oral complaints of harassment are too remote from her termination to be causally linked, as a matter of law; and (ii) that, in her letter to Ms. Jensen, Hall did not complain of sexual harassment or of any other unlawful conduct. (*Id.*). Next, Continental argues that, even if Plaintiff did establish a prima facie case based on either her oral or written complaints, it has presented a legitimate, nondiscriminatory reason for her discharge. Continental contends that Hall's overall performance record and "the severity of her actions in inaccurately representing her contact with customers and taking credit for closing files that were not resolved" justify her termination. (*Id.*; Plaintiff's Deposition at 156-57, Ex. 8). Continental argues further that Hall has not rebutted in any way that its reason for terminating her is merely a pretext for retaliation and that she would not have been fired "but for" her complaints. (Motion at 16).

To state a valid claim for retaliation under Title VII, a plaintiff must show: (i) that she engaged in protected activity under Title VII; (ii) that action was taken by the employer that a reasonable employee would consider materially adverse; and (iii) that a causal connection exists between the protected activity and the adverse action. *See White*, 126 S. Ct. at 2415; *Jones*, 427

F.3d at 995. "An employee has engaged in protected activity when she has (1) 'opposed any practice made an unlawful employment practice' by Title VII or (2)

'made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing' under Title VII." *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 372-73 (5th Cir. 1998) (quoting 42 U.S.C. § 2000e-3(a)); *accord Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 269 (2001). Sexual harassment, of course, is an unlawful employment practice under Title VII. *See Oncale*, 523 U.S. at 80. It follows then that, if Plaintiff complained about her supervisor's alleged sexual harassment, she did engage in protected activity for purposes of a Title VII retaliation claim. *See White*, 126 S. Ct. at 2415; *Harvill*, 433 F.3d at 434; *Jones*, 427 F.3d at 995; *Douglas*, 144 F.3d at 372-73.

Continental argues, however, that the April 2003 letter to Jensen cannot support a claim of retaliation, because Hall never complained of ill treatment on the basis of her sex or race at any point in that letter. (Motion at 15-16). Indeed, the record is clear that nowhere in the three-page letter, or in the affidavit she attached to it, does Hall raise any suggestion that she was being discriminated against or harassed because of her sex or race. (*See* Response at Ex. 3). In fact, at her deposition, Hall confessed to confusion on the contours of actionable harassment, and testified: I will concede that I thought hostile work environment was bullying, harassing behavior. I didn't know the law of hostile environment workplace harassment. I thought, because she was making my environment hostile by regularly confronting me and what I viewed to be providing me with inequitable, harassing treatment in her role as a supervisor, that that was also a form of harassment. (Plaintiff's Deposition at 117). Contrary to Hall's belief, however, if "workplace harassment" is not based on one's status as a

member of a protected class, it is not governed by Title VII. *See* 42 U.S.C. § 2000e-2(a)(1). Because nothing in Hall's April 2003 letter referenced unlawful activity

under Title VII, she cannot be said to have engaged in protected activity when she made that complaint. *See White,* 126 S. Ct. at 2415; *Breeden*, 532 U.S. at 269. The letter, then, cannot serve as a basis for her retaliation claim.

And, despite her lack of specificity as to her alleged repeated oral complaints, Defendant concedes that Hall made one such complaint, on December 18, 2002, to Jensen and to Judy Dyar ("Dyar"), Director of Customer Care. (Motion at 2, 15). On that date, Hall is reported to have complained about "her supervisor 'touching her,' and her feeling of being sexually harassed." (*Id.*at 15). As this constitutes a complaint about sexual harassment it is protected activity, which satisfies the first element of Hall's prima facie burden. *See Breeden*, 532 U.S. at 269. Further, in her response to Defendant's motion for summary judgment, Plaintiff establishes the second element of her prima facie case, in showing that Defendant took adverse action against her, on May 2, 2003, when she was fired. (Response at 4).

But to meet the entire prima facie burden on a claim of retaliation, a "plaintiff must [also] produce some evidence of a causal link between the protected activity and the adverse employment action." *Ackel v. National Communications, Inc.*, 339 F.3d 376, 386 (5th Cir. 2003) (citing *Fierros v. Texas Dep't of Health*, 274 F.3d 187, 191 (5th Cir. 2001)). "'[T]he mere fact that some adverse action is taken after an employee engages in some protected activity will not

always be enough for a *prima facie* case.'" *Raggs*, 278 F.3d at 471-72 (quoting *Swanson v. General Servs. Admin.*, 110 F.3d 1180, 1188 n.3 (5th Cir. 1997)). Here, Hall was terminated more than four months after she made her only identifiable oral complaint. Courts have held that periods of less than five months between the protected activity and an adverse employment action are not, by themselves, sufficient to support the causal link necessary to a retaliation claim. *See Breeden*, 532 U.S. at 273 (citing

Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir. 1997)); *Raggs*, 278 F.3d at 471-72; *see also Bell v. Bank of America*, 171 Fed. Appx. 442, 444 (5th Cir. 2006). Hall has presented no additional evidence to support her allegation that she was terminated because of that complaint. But even granting every inference in her favor, and assuming, without deciding, that Hall has made a prima facie case of retaliation, this claim ultimately fails, in any event. "The *McDonnell Douglas* evidentiary framework applies to Title VII retaliation claims brought under a pretext theory." *Septimus v. University of Houston*, 399 F.3d 601, 608 (5th Cir. 2005). "Under that framework, the employee's ultimate burden is to prove that the employer's stated reason for the adverse action was merely a pretext for the real, retaliatory purpose." *Id.*. The Fifth Circuit "'has consistently held that in retaliation cases where the defendant has proffered a nondiscriminatory purpose for the adverse employment action the plaintiff has the burden of proving that 'but for' the discriminatory purpose [she] would not have been terminated'" *Id.* (quoting *Pineda*, 360 F.3d at 487). Here, Continental

has alleged a legitimate, nondiscriminatory reason for its decision to fire her. (Motion at 16). Aside from noting the arguable temporal proximity of her discharge to her complaint, Plaintiff has failed to present any objective evidence that, but for her complaint, she would not have been terminated. For that reason, even if her retaliation claim was not barred as untimely, Hall cannot prevail on the merits of that action, and summary judgment is appropriate.

State Law Claims

Plaintiff also claims that, under Texas law, Continental is liable to her for assault, defamation, and "negligent hiring and retention." In its motion, Defendant argues that these state law claims all fail because they are either time barred or not substantiated by the available evidence. It is true that Plaintiff has submitted no evidence, or even any argument, on her state law claims.

This omission, alone, points to Plaintiff's failure to meet her burden to refute Defendant's motion for summary judgment, and warrants dismissal of these claims. *See Anderson*, 477 U.S. at 249-50; *Smith*, 391 F.3d at 625; *Stahl*, 283 F.3d at 263.

Further, Plaintiff's claims for assault and defamation are barred by the relevant statutes of limitations. In her complaint, Plaintiff summarized her assault claim as follows:

> Defendant physically assaulted the Plaintiff in violation of state law. In or about September 2002, after demanding the Plaintiff's presence in a meeting, in a closed conference room,

> Plaintiff's Supervisor / Service Manager [Barrow] intentionally made insulting and offensive physical contact with the Plaintiff.

(Complaint at 3). At her deposition, Plaintiff stated that her assault claim is based on an incident which allegedly occurred in March 2002, in which Barrow bumped into her side. (Plaintiff's Deposition at 182-83). In Texas, a civil assault claim must be brought "not later than two years after the day the cause of action accrues." TEX. CIV. PRAC. & REM. CODE § 16.003. Plaintiff did not file this lawsuit, however, until January 2005, approximately two years and four months after the most recent incident allegedly occurred. Clearly, her assault claim is barred by the two-year statute of limitations, and summary judgment is appropriate on that action. In summarizing her claim for defamation, Plaintiff stated that:

> Defendant, by its agent, the Director of Customer Care, on or about May 2, 2003, and by its agent, the Managing Director of Reservations, on or about June 6, 2003, and by its agent, the Plaintiff's Supervisor / Service Manager, on or about January 28, 2003, defamed the Plaintiff by publishing defamatory statements concerning the plaintiff, while acting with either malice or negligence, regarding the truth of the statement, in violation of state law. Defendant, by its agent, the Director of Customer Care, on or about May 2, 2003, and by its agent, the Managing Director of Reservations, on or about June 6, 2003, attacked the Plaintiff's professional character and standing, and effectively alleged that the

> Plaintiff committed one or more crimes of moral turpitude, by and through their published writings.

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(Complaint at 3). At her deposition, Hall testified that her defamation complaint is centered on the contents of the May 2, 2003 discharge letter, as well as management meetings prior to that date, in which her termination was discussed (Plaintiff's Deposition at 181-82, 193-94). In Texas, a defamation claim must be filed "not later than one year after the day the cause of action accrues." TEX. CIV. PRAC. & REM. CODE § 16.002(a). Here, Plaintiff did not file this lawsuit until more than one-and-one-half years had elapsed since the most recent incident of alleged defamation. *See id* For this reason, her defamation claim is barred under the one-year statute of limitations, and summary judgment is proper on this claim, as well. *See id.*

Finally, on her claim for "negligent hiring and retention," Plaintiff alleges that "Defendant breached its duty to hire and retain employees with care, in violation of state law," which she ties to her supervisors' allegedly offensive and unlawful harassment. (Complaint at 3). Under Texas law, "[t]o prevail on a claim for negligent hiring or supervision, the plaintiff is required to establish . . . that the employer was negligent in hiring or supervising the employee, [and that] the employee committed an actionable tort against the plaintiff." *Brown v. Swett & Crawford of Tex., Inc.*, 178 S.W.3d 373, 384 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *Castillo v. Gared, Inc.*, 1 S.W.3d 781, 786 (Tex. App.—Houston [1st Dist.] 1999, pet. denied)); *see Alvarez v. United Parcel Serv. Co.*, 398 F. Supp. 2d 543, 553 (N.D. Tex. 2005). Plaintiff has not

attempted to make such showings in this instance.[2] For these reasons, summary judgment is also appropriate on Plaintiff's claim of negligent hiring and retention.

In sum, Plaintiff has failed to demonstrate the existence of a genuine issue of material fact which remains for trial on any of her pending claims. For this reason, summary judgment is warranted, and this case should be dismissed.

Conclusion

Accordingly, it is RECOMMENDED that Defendant's Motion for Summary Judgment be GRANTED, and that Plaintiff's action be DISMISSED.

The Clerk of the Court shall send copies of the memorandum and recommendation to the respective parties, who will then have 10 business days to file written objections, pursuant to 28 U.S.C. §636(b)(1)(c), General Order 02-13, S.D. Texas.

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[2] In any event, the court can easily dispose of the abandoned claims. For example, the Thirteenth Amendment does not provide an independent cause of action for discrimination in employment. *See Martinez v. Bohls BearingEquip. Co.*, 361 F. Supp. 2d 608, 614 (W.D. Tex. 2005); *Doffoney v. Board of Trustees for Beaumont Indep. Sch. Dist.*, 731 F. Supp. 781, 782 (E.D. Tex. 1989). Further, the Texas law on retaliation is sufficiently similar to Title VII, so that if Plaintiff's Title VII retaliation claim fails on the merits, then the state law claim fails, as well. *See Pineda v. United Parcel Serv.*, 360 F.3d 483, 487 (5th Cir. 2004). Finally, Plaintiff has not alleged facts to support a common law claim of wrongful discharge, which, in Texas, is available only to employees who were required to perform an illegal act. *SeeBlase Indus. Corp. v. Anorad Corp.*, 442 F.3d 235, 239 (5th Cir. 2006); *see also Winters v. Houston Chronicle Publ'gCo.*, 795 S.W.2d 723, 723-24 (Tex. 1990).

Failure to file written objections within the time period provided will bar an aggrieved party from attacking the factual findings and legal conclusions on appeal. The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208; copies of any such objections shall be delivered to the chambers of Judge Vanessa D. Gilmore, Room 9513, and to the chambers of the undersigned, Room 7007.

The Clerk shall enter this Order and provide a true copy to all counsel of record.

SIGNED at Houston, Texas, this 14th day of December, 2006.

/s/ Mary Milloy .

MARY MILLOY
UNITED STATES MAGISTRATE JUDGE

Unites States District Court
for the
Southern District of Texas, Houston Division

Ursula Hall,	:	Case No.: H-05-015
Plaintiff,	:	
vs.	:	
	:	
Continental Airlines Inc.,	:	
Defendant	:	
	:	
	:	
	:	Jury
	:	

Plaintiff's Objections to Magistrate's Memorandum and Recommendations on Defendant's [Second] Motion for Summary Judgment

Plaintiff's Objection No. 1: Summary Judgment is Premature.

Plaintiff objects to Magistrate Milloy's failure to conduct "full pretrial management" of this case under 28 U.S.C. §636, as required by the office of magistrate and federal statute.

Magistrate Milloy failed to manage properly the pretrial matters in this case, thus, this summary judgment ruling is premature. There are significant matters unresolved by magistrate Milloy that should

have been resolved prior to any ruling on this dispositive motion.

"Summary judgment is appropriate only if, after adequate discovery, there is no genuine dispute over any material fact." *Sunbelt Sav. v. Montross*, 923 F.2d 353, 355 (5th. Cir. 1991) citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); and also citing *Pennington v. Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989); *Washington v. Armstrong World Indus.*, 839 F.2d 1121 (5th Cir. 1988). Summary judgment is not appropriate because there has not been adequate discovery in this case. *Id.* Plaintiff's inability to obtain adequate discovery results entirely from the unjust and obstructionist conduct of the defendant, thus, a continuance is further warranted. *Sunbelt Sav.* at 357-58; also see *XRT. Inc. v. Krellenstein*, 448 F.2d 882 (5th Cir. 1971).

Summary judgment is premature in light of Plaintiff's pending discovery motions before the court, particularly since Defendant Continental Airlines promised to appear, but did not; Plaintiff properly noticed the depositions; and Defendant Continental Airlines did not obtain rulings on its Motions to Quash and Protection (including that filed on behalf of its supervisor-employee, despite its lack of standing). *Smith v. City of Jackson*, 351 F.3d 182 (5th Cir. 2003). The Fifth Circuit Court of Appeals "simply h[e]ld that the district court should have addressed [the pending] motions before it ruled" on

the dispositive motion. *Id.* at 198. "If the defendants did not comply with their discovery obligations such that the plaintiffs were prohibited from presenting their best case to the district court, summary judgment in favor of the defendants improperly denied the plaintiff[ ] an opportunity to continue discovery and supplement the record." *Id.* citing *Sunbelt.*

Plaintiff's Objection No. 2: The rule of law was ignored.

Plaintiff objects to Magistrate Milloy's reconsideration of the matter of timeliness of the Plaintiff's complaint. Plaintiff objects, therefore, to the changed law of the case whereby Magistrate Milloy reconsidered a previously settled matter of law of the case.

Magistrate Milloy also failed to properly manage this case in that she failed to abide by her magisterial duty to abide by reasonable, consistent principles and dictates of the rules of law. Magistrate Milloy has a duty to abide by the law of the case doctrine, in this case, because there are no intervening changes in law, fact, or circumstance to warrant an exception to the doctrine.

In a prior summary judgment ruling, by Magistrate Milloy, to which Defendant Continental Airlines did not object, and for which the time for objection has passed, it was established in the case that Ursula Hall timely filed her Complaint. *See* Docket Instruments 15, 16, 17, 18, and 33.

Law of the case is sound judicial doctrine recognized by the Fifth Circuit, United States v. Mendez, 102 F.3d 126, 131 (5th Cir. 1996), and all other federal courts. As well stated by Circuit Court of the District of Columbia: "Inconsistency is the antithesis of the rule of law... Two time-honored doctrines help put that principle into practice. The first is the law-of-the-case doctrine: the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*..." The finality, promoted by the doctrine, is the finality upon which Plaintiff reasonably relied in this case. The magistrate, through a prior summary judgment ruling, had already established the law of the case on the matter of timeliness: after reviewing motion, response and evidence, Magistrate Milloy ruled, without objection to her ruling, that Ursula's complaint was timely. *See* Docket Instrument 33. She even admonished the Defendant: "No further motions to dismiss under Rule 12 (b)(6), will be allowed as it is clearly inapplicable to Plaintiff's complaints."

In the instant motion for summary judgment, Defendant Continental makes the exact same arguments and alleged factual presentations, as it presented in the previously denied summary judgment. Nothing in the "the evidence on a subsequent [motion] was substantially different, [nor has] controlling authority ... since made a contrary decision of the law applicable to such issues, [n]or [was] the decision ... clearly erroneous [such that it] would work a manifest injustice." *Williams v. City of New Orleans*, 763 F.2d 667, 669 (5th Cir. 1985) quoting *White v. Murtha*, 377 F.2d 428, 431(5th Cir. 1967)). In fact, manifest injustice only accrues to the Plaintiff under the Magistrate's Memorandum and

Recommendations, because the law of the case doctrine was violated.

The law of the case doctrine dictates that Plaintiff timely filed her complaint. *See* Order, Docket Instrument 33. As a direct result of Defendant's conduct, which conduct contravened the rule of law and the local rules of this court, the Magistrate converted the Defendant's 12(b) motion as a motion for summary judgment. *See* Docket Instrument 15. Evidence was submitted, in summary judgment fashion, on the sole matter of the timeliness of Plaintiff's complaint, and the Magistrate ruled the complaint timely. *See* Order, Docket Instrument 33. Resultantly, the matter of timeliness was forever foreclosed; there have been no intervening changes in law, fact, or circumstance to warrant an exception to the doctrine of the law of the case.

Plaintiff's Objection No. 3: Magistrate Milloy committed legal error.

Additionally, or in the alternative, Magistrate Milloy committed legal error by applying the law of *Taylor* to this case at all. Taylor involves a case wherein the defendant and the court properly remained within the confines of the pleadings to determine a 12(b)6 motion; the complaint was "facially untimely." *Taylor v. Books-A-Million, Inc.*, 296 F.3d 376 (5th Cir. 2002). The holding in that case, applies solely to the circumstance where rule 12(b)6 is abided; if the Defendant had not circumvented the rules of procedure and the local rules of court, and been allowed to do so by Magistrate's conversion of the motion, then Taylor and its "presumption" progeny would apply. One need not list the exact date of receipt in one's complaint as a general matter.

However, if the date is not present and "no outside evidence" on the matter is presented, the 12(b)6 motion must be granted.

Alternatively, Plaintiff hereby, and simultaneously in a separate docket instrument, motions the court to allow "supplementation" of the record, with the exact same evidence, previously filed, and favorably ruled upon, on the matter of timeliness. Specifically, Plaintiff asks the district court to consider Plaintiff's response to Defendant's first motion for summary judgment, found at Docket Instruments 16 and 17, as if the same were restated and fully incorporated herein.

Plaintiff's Objection No. 4: Magistrate Milloy's findings suggest bias.

Magistrate Milloy failed to respond to any legal or evidentiary objection contained in Plaintiff's response to Defendant's motion for summary judgment.

Plaintiff's Objection No. 5; Reference: M&R p.1, ¶1, S2: Before the court is the motion by Defendant Continental Airlines, Inc. ("Defendant," "Continental") for summary judgment.

Plaintiff objects to Magistrate Milloy's statement regarding the matters "before the court." In fact, before the court is not only defendant's motion for summary judgment, but also outstanding discovery motions. All of the outstanding motions should have been promptly resolved and all should have been resolved prior to this dispositive motion.

Plaintiff's Objection No. 6 ; Reference: M&R p.1, ¶1, S3: Plaintiff Ursula Hall ("Plaintiff," "Hall") filed a response to the motion, and Defendant has replied to her arguments.

Plaintiff objects to Magistrate Milloy's facially inconsistent, and arguably biased, characterization of the instrument filing facts: Defendant Continental "has [not] replied to her arguments." Ursula Hall filed a response to the Defendant's motion for summary judgment and Defendant Continental filed a reply. The Magistrate's statement that Defendant Continental "has replied to her arguments" inaccurately suggests that Defendant Continental replied to every argument presented by Ursula Hall; it is an unacceptable mischaracterization of the "reply" instrument. Defendant Continental ignored scores of law, argument and fact presented by Ursula Hall.

Plaintiff's Objection No. 7; Reference: M&R p.1, ¶2 S1: After considering the pleadings, the evidence submitted, and the applicable law, it is RECOMMENDED that the Defendant's motion for summary judgment be GRANTED, and that this case be DISMISSED.

Plaintiff objects to Magistrate Milloy's characterization of her judicial review: Magistrate Milloy clearly did not review all of the pleadings, all of the evidence submitted, and all of the applicable law. Not only did she not even mention much of anything from the plaintiff she selectively reviewed the law and the evidence and only considered the defendant's point of view. A proper review of all of the applicable law, evidence submitted and pleadings would result in a denial of summary judgment.

Plaintiff objects to Magistrate Milloy's recommendation that the Defendant's motion for summary judgment be granted and this case dismissed. Plaintiff objects for all of the reasons set forth herein... and in her motions for all sorts of other stuff...filed simultaneously with her objections.

Plaintiff's Objection No. 8; Reference: M&R p.1, ¶2 S1: "In this action, Ursula Hall complains that, while employed with Continental Airlines, Inc., she was subjected to unlawful discrimination on the basis of her race and sex, in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. §§ 2000(e) *et seq.*, and Sections 1981 and 1983 of the Civil Rights Acts 0f 1866 and 1871, as amended ("Section 1981," "Section 1983")."

Plaintiff objects to this summary of the Plaintiff' complaint to the extent that Magistrate Milloy's Memorandum and Recommendation fails to acknowledge or address the fact that the discrimination claims in this case include, *inter alia*, claims for discriminatory discharge and retaliation, under Title VII.

Plaintiff's Objection No. 9; Reference: M&R p.2, ¶1,S1: "She also claims that, because she complained of this unlawful treatment, the company began to retaliate against her, and ultimately, fired her."

Plaintiff objects to this summary of the Plaintiff' complaint to the extent that Magistrate Milloy's Memorandum and Recommendation fails to acknowledge or address the fact that the Plaintiff has properly raised matters regarding Employer-Continental Airlines' retaliatory, adverse actions

comprised of not only "ultimate employment action" but also nonmaterial and material actions affecting the terms and conditions of employment.

Plaintiff's Objection No. 10; Reference: M&R p.2, ¶1, S2: "Finally, she alleges that, under state law, Continental is liable to her for assault, defamation, and 'negligent hiring and retention."'

Plaintiff objects to this summary of the Plaintiff' complaint to the extent that Magistrate Milloy's Memorandum and Recommendation fails to acknowledge or address the fact that the Plaintiff has properly raised matters under federal law regarding physical harassment, nonphysical harassment, employer duties, and employer liability for supervisory harassment.

Defendant Continental was well aware that its supervisory agent engaged in an unwelcome, intentional touching of the Plaintiff's body. In fact, it was Defendant Continental who announced to the Plaintiff that the unwelcome, intentional touch was in fact, sexual harassment.

> "The Commission will presume that the unwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the condition of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment. If an employee's supervisor sexually touches that employee, the Commission normally would find a violation. In such situations, it is the

> employer's burden to demonstrate that the unwelcome conduct was not sufficiently severe to create a hostile work environment.
>
> When the victim is the target of both verbal and non-intimate physical conduct, the hostility of the environment is exacerbated and a violation is more likely to be found.
>
> Similarly, incidents of sexual harassment directed at other employees in addition to the charging party are relevant to a showing of hostile work environment.

EEOC Policy Guidance on Current Issues of Sexual Harassment, citing *Hall v. Gus Construction Co.*, 842 F.2d 1010, 46 EPD ¶ 37,905 (8th Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 44 EPD ¶ 37,542 (10th Cir. 1987); *Jones v. Flagship International*, 793 F.2d 714, 721 n.7, 40 EPD ¶ 36,392 (5th Cir. 1986), cert. denied, 107 S. Ct. 952, 41 EPD ¶ 36,708 (1987)." www.eeoc.gov ,Policy Guidance on Current Issues of Sexual Harassment.htm.

Plaintiff's Objection No. 11; Reference: M&R p.2, ¶2, S1: "Plaintiff was hired by Continental, in 1996, as an airport ticket agent."

Plaintiff objects to this alleged statement of fact, citing from Defendant Continental's Motion, in Magistrate Milloy's Memorandum and Recommendation; it is incorrect: Plaintiff was hired as an Airport Services Agent. As an Airport Services Agent, Ursula was hired as a gate agent, baggage claims agent and a ticket counter agent.

Plaintiff's Objection No. 12; Reference: M&R p.2, ¶2, S2: "...Hall's duties changed and she became a 'Customer Care Manager.'"

Plaintiff objects to Magistrate Milloy's factually inaccurate, and, arguably biased and misleading statement of fact, adapted from Defendant Continental's Response: "Hall's duties" did not simply "change[ ]." Ursula Hall was promoted from an hourly employee into management, following a highly selective, merit-based process, including application, screening, multiple interviews, and prior performance review.

Plaintiff's Objection No. 13; Reference: M&R p.2, ¶2, S3: "In that position, she received, investigated, and responded to customer complaints."

Plaintiff objects to Magistrate Milloy's statement of fact, which statement she again adapted wholly from Defendant's submissions, to the extent it fails to accurately reflect that the Ursula did not initially "receive" correspondence directly from customers. The entire responsibility for intake, receipt, assignment and designation of customer correspondence was borne by the company, through its mail, electronic mail, telephone and walk-in systems. Further, Ursula's work was not confined to "complaints"; she responded to comments, requests, inquires and compliments, as well as complaints.

Plaintiff's Objection No. 14; Reference: M&R p.2, ¶2, S4: Plaintiff alleges that, in March 2002, her supervisor, Joycelyn Barrow ("Barrow"), began to harass her by making unsolicited, sexually explicit gestures and comments, and that she physically assaulted her. (Complaint at 2.)

Plaintiff objects to Magistrate Milloy's inaccurate analysis of the Complaint: the Plaintiff did not allege, on page 2 of the Complaint, that her supervisor began to harass her in March 2002. The Complaint alleges, on page 2, that Ursula's superiors began discriminatorily engaging in adverse employment actions and Ursula began reporting her supervisor's discriminatory conduct on or about March 1, 2002.

Plaintiff's Objection No. 15; Reference: M&R p.2, ¶2, S5: "Hall claims that when she complained about Barrow's conduct, Continental took no appropriate remedial action. (*Id.* at 2-3)."

Plaintiff objects to Magistrate Milloy's inaccurate restatement of facts in the Plaintiff's complaint regarding the persons about whom she complained and by whom she was discriminatorily treated: at pages 2-3, the Complaint refers to the discriminatory conduct by "Plaintiff's Supervisors / Service Managers, the Director of Customer Care, the Managing Director of Reservations, and / or the Director Human Resource Reservations Division."

Plaintiff's Objection No. 16; Reference: M&R p.2, ¶2, S6. "Plaintiff alleges that, instead, she was "progressively punished, and ultimately fired, in retaliation for" her complaints. (*Id.* at 2)."

Plaintiff objects to Magistrate Milloy's inaccurate restatement of facts in the Plaintiff's complaint regarding Defendant Continental's response to her complaints, including the inaccurate statement of persons about whom she complained and by whom she was discriminatorily treated: page 2 of the

Complaint refers to the discriminatory conduct by "Plaintiff's Supervisors / Service Managers, the Director of Customer Care, the Managing Director of Reservations, and / or the Director Human Resource Reservations Division."

The Complaint includes Ursula's written complaint, submitted to her superiors, five (5) days before Defendant Continental fired her. Additionally, Ursula's Complaint includes her written appeal, submitted to her superiors, twenty-one (21) days before her termination was affirmed by Defendant Continental, through its internal appeal process.

Plaintiff's Objection No. 17; Reference: M&R p.2, ¶2, S7. "Hall contends that, in March 2002, her superiors began to enforce policies and procedures against her that they did not enforce against other similarly situated male Caucasian employees. (*Id.*)."

Plaintiff objects to Magistrate Milloy's wholly inaccurate restatement of facts wherein she states the Complaint refers to "male Caucasian" comparators: neither the word male nor the word Caucasian appears anywhere in Plaintiff's Complaint. In fact, the allegation of discriminatory discharge in the Complaint makes the following statement about comparators: "...the Defendant applied alleged rules, policies, and procedures to Plaintiff in a way that Defendant applied to no one else similarly situated to Plaintiff, in job duties." Complaint, p.2, ¶7.

Plaintiff objects to Magistrate Milloy's blatant and legally disingenuous effort to collapse the

independent claims of retaliation, discriminatory discharge, and sexual harassment into one claim, and thus the comparators, which she then summarily dismisses.

Plaintiff's Objection No. 18; Reference: M&R p.2, ¶2, S8-9: "It is undisputed that, on May 2, 2003, Hall was terminated. On that date, Continental informed her that she was discharged because of her 'overall performance record' and 'the severity of her actions in inaccurately representing her contact with customers and taking credit for closing files that were not resolved.'" (Motion at Ex. 2 ["Plaintiff's Deposition"] at 156-57, Ex, 8).
Plaintiff objects to Magistrate Milloy's restatement of facts of May 2, 2003, which statement she again adapted wholly from Defendant's submissions. The alleged statement of facts by Magistrate Milloy is inaccurate, biased, and completely fails to make any reference to any submission by Plaintiff Hall on the matter.

Defendant Continental Airlines established a genuine, material factual dispute all by itself on that day: not only did Defendant Continental Airlines provide Ursula with a termination letter stating, among other things, that she was being fired because of her "overall performance record" but also Defendant Continental Airlines provided Ursula with a "Performance History" statement stating her performance was "on target" for the entire period she was rated in the department. This documentary evidence, specifically referenced in and attached to Plaintiff's Response to Defendant Continental's Motion for Summary Judgment was not referred to,

mentioned, cited, evaluated, weighed or analyzed at all by Magistrate Milloy. These two documents alone establish genuine, material issues of fact, precluding summary judgment.

Defendant Continental Airlines lists two pages of "reasons" for which Ursula Hall was allegedly fired. Magistrate Milloy delineated two "reasons" from among the two pages of reasons she cites. Neither of the two reasons she cites, nor any other reason among the two-page letter from which she cites, is substantiated by qualified summary judgment evidence.

Furthermore, in violation of every relevant discovery rule of law, practice and procedure, Magistrate Milloy allows Continental Airlines to rely upon "evidence" from witnesses whom Continental Airlines refused to present for deposition. Continuing her apparent bias and derogation of duty, Magistrate Milloy failed to rule upon the still pending, critical discovery motions, presented to her, prior to Defendant Continental filing its motion for summary judgment and in the Plaintiff's response to that motion.

Defendant Continental wholly failed to respond to discovery: they refused to present any deponents, attempt to support their summary judgment motion with documents from those same deponents they refused to present, and rely upon documentary evidence they failed to timely submit. Defendant Continental's conduct is outrageous and Magistrate Milloy's ratification of their violative conduct is equally so.

There is not one piece of valid evidence establishing the defamatory accusations that Ursula Hall "inaccurately represent[ed] her contact with customers" or "t[oo]k credit for closing files that were not resolved." However, despite Magistrate Milloy's failure to reference the Plaintiff's valid evidentiary submission by the Plaintiff, there is evidence that Ursula Hall neither "inaccurately represent[ed] her contact with customers" or "t[oo]k credit for closing files that were not resolved."

Plaintiff's Objection No. 19; Reference: M&R p.3, ¶1, S1: "On May 21, 2004, Hall filed a complaint with the Equal Opportunity Commission ("EEOC")."

Plaintiff objects to this inaccurate statement of fact by Magistrate Milloy. Ursula Hall did not file a complaint with the "EEOC." As indicated on the face of the very exhibit to which Magistrate Milloy cites, Plaintiff's Deposition at Ex.9, Plaintiff filed a complaint with the Texas Workforce Commission, Civil Rights Division, the state's Fair Employment Practice Agency (FEPA), through which the state's anti-discrimination laws are enforced. In fact, the FEPA "dual filed" the charge with the EEOC, to ensure Ursula's rights were protected under both state and federal law.

Plaintiff's Objection No. 20; Reference: M&R p.3, ¶1, S2: "In her complaint, she alleged that Continental had discriminated against her on the basis of her sex, and had terminated her in retaliation for complaining about that conduct."

Plaintiff objects to the misleading and incomplete description of the content of her FEPA-filed complaint: the complaint alleged retaliation and sexual harassment, a discrete and independent form of sex discrimination.

Magistrate Milloy, again in a seemingly biased tracking of Defendant Continental Airline's characterizations, fails to acknowledge that "sex discrimination" and "sexual harassment" are reasonably regarded as two separate types of discrimination, though one is a subset of the other. Significantly, for example, the "home page" of the EEOC website includes the following list: "Discrimination by Type: Facts and Guidance – Age, Disability, Equal Pay, National Origin, Pregnancy, Race, Religion, Retaliation, Sex, Sexual Harassment." www.eeoc.gov. For many years, in fact, not until 1986, was it established by the United States Supreme Court, as a matter of law that "sexual harassment," in violation of Title VII, distinguished from "sex discrimination" even existed. *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986).

Plaintiff's Objection No. 21; Reference: M&R p.3, ¶1, S3: "On September 29, 2004, the EEOC issued a right to sue letter, and, on January 18, 2005, Hall filed this action."

Plaintiff objects to Magistrate Milloy's inaccurate and misleading statement of fact regarding the date on which the EEOC "issued" its right to sue letter. There is no proof anywhere in the record from the EEOC regarding the date on which the EEOC "issued" its letter.

Plaintiff objects to Magistrate Milloy's failure to abide by the law-of-the case doctrine, the Magistrate Act, and the rule of law: The matter of timeliness has already been litigated in this action. Magistrate Milloy issued an order on the subject by which she found the Plaintiff's lawsuit was timely, Defendant Continental's 12(b)(6) assertion that there was no claim upon which relief could be granted because of timeliness "inappropriate," and denying summary judgment regarding the same. Most importantly, Continental Airlines filed no objection to Magistrate Milloy's findings or ruling on the matter of statute of limitations. (And of course, the ten-day time limit in which to do so has long since passed.) Nothing in this subsequent filing is any different than the original filing on which Magistrate Milloy ruled. Timeliness, or statute of limitations, cannot be ruled upon in favor of Continental Airlines, unless the District Court finds there to have been clear error. No error exists; the only relevant inquiry regarding the timeliness of plaintiff's action is the date on which the right-to-sue letter was received. The Plaintiff presented uncontroverted proof of the day on which she received the right to sue letter; it was a day less than ninety days before filing.

Plaintiff further objects to this inaccurate, biased and misleading statement of facts to the extent that Magistrate Milloy uses these alleged facts to cite to the authority of *Taylor*. Unlike *Taylor*, wherein the court was analyzing a 12(b)(6) motion, without converting the matter to a motion for summary judgment, Magistrate Milloy already resolved the statute of limitations matter, in favor of Ursula Hall, without objection. The matter cannot no be resolved in Defendant Continental's favor.

Plaintiff's Objection No. 22; Reference: M&R p.14, ¶2, S: "Indeed, the record is clear that nowhere in the three-page letter, or in the affidavit she attached to it, does Hall raise any suggestion that she was being discriminated against or harassed because of sex or race. (*See* Response at Ex. 3)."

Plaintiff objects to the factually incomplete summary of facts and the Magistrate's outrageous refusal to address the following text in the exact referenced letter:

> A[p]ril 29, 2003
> Ms. Gigi Jensen, Director, Human Resources, Reservations Division...
> Re: Complaint
>
> Dear Ms. Jensen:
>
> I hereby complain of workplace harassment. I direct this complaint to you because I fear further retaliation by my superior(s). In addition, I hereby complain that my superiors violated their duties to me, as those duties are delineated in company policy. Further, I hereby complain that my superiors have violated my due process rights, as established by Continental Airlines' Performance Improvement Process. Among other things, "Continental Airlines expressly prohibits retaliation against any person filing a complaint of harassment or against any person participating in an investigation. [1]...

[1] *Working Together Guidelines*, Continental's Comittment [sic] in the Workplace. Equal [E]mployment Opportunity in the Workplace, Reporting Harassment (Sexual or Otherwise), p. 6.

It strains all manner of intelligence, even among the inexpert like the Plaintiff, to believe that this text, and its specific footnote reference to the company's workplace harassment guidelines, specifically mentioning the "Reporting [of] Harassment (Sexual or Otherwise)" does not alert a human resources professional to the Plaintiff's claims.

"Workplace harassment" is a legal term of art denoting discrimination under Title VII. *See, e.g., Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1001 (1998) (stating that Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment") (emphasis added) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (citations and internal quotation marks omitted)). "...The Equal Employment Opportunity Commission ("EEOC") promulgated guidelines to assist employees and employers in determining what constitutes workplace harassment." Timothy Schiell, Book Review: Campus Hate Speech on Trial, 8 B.U. Pub. Int. L.J. 579.

Magistrate Milloy herself uses the term is a published opinion from this court: "In this circuit, an employer is not entitled to summary judgment on a *Faragher/Ellerth* affirmative defense if the complainant can show that she complied with the employer's own policy on reporting workplace

harassment.")." Rodriguez v. City of Houston, 250 F. Supp. 2d 691, 702 [citations omitted].

"Workplace harassment is a form of discrimination." Federal Communications Commission, Office of Workplace Diversity, Understanding Workplace Harassment. http://www.fcc.gov/owd/understanding-harassment.html, last accessed December 29, 2006. "Title VII solely addresses workplace harassment..." James E. Robertson, 36 Am. Crim. L. Rev. 1, Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates [citations omitted]. "Many states are developing distinctive bodies of law about workplace harassment ...Discrimination cases are more plentiful by two orders of magnitude, yet in the 33 years since Title VII was enacted the Supreme Court has heard only two involving workplace harassment. Prospects for a uniform federal common law in this field are dim." *Jansen v. Ellerth*, 123 F.3d 490, 554, 556 (7th Cir. 1997).

While the Plaintiff may not have used the "magic words," clearly the quoted letter statement brings her complaints into context and supports the reasonable inference that Title VII violations were the reason for her complaint. Furthermore, the letter was preceded by a specific oral complaint to the same human resources manager and it complies with the directions in company policy. At the very least, Plaintiff's letter implicitly communicated her Title VII complaints; after all, it is the sole basis upon which Defendant Continental "publishes" its workplace harassment guidelines. One engages in legally cognizable "opposition" whenever one "explicitly or implicitly communicates to his or her

employer or other covered entity a belief that its activity constitutes a form of employment discrimination that is covered by any of the statutes enforced by the EEOC." EEOC Compliance Manual, Section 614, Volume 2, http://www.eeoc.gov/policy/docs/retal.html , last accessed December 29, 2006. *Also see e.g. Barber v. CSX Distribution Servs.*, 68 F.3d 694 (3d Cir. 1995).

Surely, as a matter of law, this letter constitutes implicit opposition to discrimination and can serve as the basis for the claim; alternatively, it presents a genuine issue of fact.

This opposition letter was delivered and read five (5) days before the Plaintiff was fired. And such "tight" temporal proximity alone is sufficient to establish the causal link. *See Clark County Sch. Dist. V. Breeden*, 532 U.S. 268 (2001).

Plaintiff's Objection No. 23; Reference: M&R p.14, ¶2, S2-3: In fact, at her deposition, Hall confessed to confusion on the contours of actionable harassment... Contrary to Hall's belief, however, if "workplace harassment" is not based on one's status as a member of a protected class, it is not governed by Title VII.

Plaintiff objects to Magistrate Milloy's temporal assumptions about this statement. Nothing in this statement indicates *when* Plaintiff Hall held this mistaken belief.

In fact, at her deposition, she states that Defendant Continental informed her of the sexual harassment

basis of her lawsuit and thereafter, she reported the matter human resources manager Gigi Jensen. Plaintiff' Deposition 101-104, Appendix 5. From December 16, 2002 until the present, Plaintiff Hall was very clear about the sexual harassment basis of her "workplace harassment" claim. Plaintiff's Deposition 103, Appendix 5. Moreover, the deposition bears out that in the month of September 2002 the Plaintiff labored under mistaken beliefs. Plaintiff's Deposition at 116-120. See Appendix 5. Thus, this mistaken factual connotation by Magistrate Milloy has no bearing.

Plaintiff's Objection No. 23; Reference: M&R p.15, ¶2, S2-3: "Defendant concedes that Hall made one such complaint, on December 18, 2002..."

Plaintiff objects to this inaccurate rendition of facts. Plaintiff Hall complained to Judy Dyar and Joycelyn Barrow in a meeting with only the two of them on December 16, 2002. See Appendix 2, p. 117. Plaintiff made a second oral complaint to Gigi Jensen, alone, on December 18, 2006. The meeting with Gigi Jensen was arranged by Judy Dyar after the sexual harassment was reported to her. Plaintiff's Deposition p. 102. Gigi Jensen invited Plaintiff Hall, through an electronic meeting planner, with the subject line "concerns you've raised" regarding harassment. See Appendix 2, p. 134. On December 23, 2006, Judy Dyar announced that we would meet again soon to discuss "concerns you've raised." On February 19, 2003 Judy Dyar reversed a negative, undeserved performance review given to me by Joycelyn Barrow, undoubtedly the reversal was related and necessitated by the inaccuracy of the rating and "the concerns you've

raised." See Appendix 2, p. 122. Furthermore, evidence indicates that the meeting to "follow up" on the discrimination "concerns you've raised" did not occur until March 13, 2002. See Appendix 2, p. 121. Alternatively, the meeting with Plaintiffs superiors and human resources, intended to "follow up" on "concerns you've raised" regarding harassment did not occur until January 29, 2002. See Appendix 2, p. 183-85. January 29 – April 29, April 29, 2002, being the day on which Plaintiff was suspended from employment is less than three months. And the time between the "follow up" meeting about harassment and Plaintiff's discharge is less than four months.

Plaintiff's Objection No. 23; Reference: M&R p.16, ¶2, S2-3: "Aside from noting the arguable temporal proximity of her discharge to her complaint, Plaintiff has failed to present any objective evidence that, but for her complaint, she would not have been terminated."

Plaintiff objects to this unfathomable conclusion by Magistrate Milloy. Plaintiff presented evidence that her entire "performance history" in the company was positive. Plaintiff presented evidence that there was no evidence of misconduct of any sort. Plaintiff presented proof that there as no evidence of unduly "taking credit" for files. None of these assertions or evidence was addressed by Magistrate Milloy at all.

Plaintiff presents evidence that Continental Airline's alleged reasons for firing her are not believable at all. The company's "performance history" statement alone makes that clear: every rating the Plaintiff ever received was "on target." A trier of fact can infer the ultimate fact of discrimination from the falsity of Continental's explanation, therefore,

summary judgment cannot be granted. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Simultaneously and with her objections to the same, Plaintiff asks the district court to continue its review of the Magistrate's Memorandum and Recommendations on the Defendant's Motion for Summary Judgment, and any responses thereto, and extend the deadline for objections, in the interests of justice, allowing Plaintiff to file an amended response, as authorized by Federal Rule of Civil Procedure 56(f). Additionally, Plaintiff motions the district court for leave to amend to supplement the record now, with all of the matters in the attached Appendices, *and* again, after adequate discovery is completed. *Freeman v. County of Bexar*, 142 F.3d 848, 852 (5th Cir. 1998).

Plaintiff asks the district court to grant additional time for discovery because summary judgment is premature.

Respectfully submitted,

/s/ Ursula Hall

Ursula A. Hall, *Pro Se*
Post Office Box 233
Houston, Texas 77001-0233
Telephone: (713)440-6900
Telecopier: (713)440-6000
E-mail: uah@email.msn.com

Certificate of Service

I hereby certify that the foregoing was served on Defendant Continental Airlines by electronic means, to the "Lead Attorney," Louis K. Obdyke, IV, and the "Attorney to be Noticed," Danielle K. Herring, upon filing the same in the Southern District of Texas Document Filing System, CM/ECF, on this the 29th day of December, 2006.

/s/ Ursula Hall

Unites States District Court
for the
Southern District of Texas, Houston Division

Ursula Hall,	:	Case No.: H-05-0158
Plaintiff,	:	
vs.	:	
	:	
Continental Airlines Inc.,	:	
Defendant	:	
	:	
	:	
	:	Jury
	:	

Plaintiff's Motion for Continuance and to Supplement the Record

Simultaneously and within her objections to the same, Plaintiff asks the district court to continue its review of the Magistrate's Memorandum and Recommendations on the Defendant's Motion for Summary Judgment, and any responses thereto, and extend the deadline for objections, in the interests of justice, allowing Plaintiff to file an amended response, as authorized by Federal Rule of Civil Procedure 56(f). Additionally, Plaintiff motions the district court for leave to amend to supplement the record, now and after adequate discovery is

completed. *Freeman v. County of Bexar*, 142 F.3d 848, 852 (5th Cir. 1998).

Plaintiff asks the district court to grant additional time for discovery because summary judgment is premature. Discovery is not yet complete; there has not been adequate discovery. The Magistrate has not resolved pending discovery motions, including motions to compel and strike. "But for" the Magistrate's failure to rule on the pending motions, which already included motions for continuance / stay, this additional, or appealing, motion would not be necessary

The Plaintiff is prevented from presenting the best case because Defendant Continental Airlines has knowingly and willingly denied Plaintiff proper discovery. Not only did Defendant Continental Airlines refuse to appear for its deposition, it instructed its employee-supervisor not to attend. *See* Docket Instrument Numbers 49, 50, 45, 47, 52.

Plaintiff should be allowed to supplement to record, given the substantial injustice that would otherwise accrue, given the prematurity of this summary judgment effort by Defendant Continental Airlines. All of the relevant factors for doing so weigh in favor of the Plaintiff, as described below. *Freeman v. County of Bexar*, 142 F.3d 848 (5th Cir. 1998). The district court's wide discretion for open-ended review and consideration of evidence, even including that not proffered to the Magistrate, requires that supplementation be allowed. *Id.*

"Summary judgment is appropriate only if, after adequate discovery, there is no genuine dispute over any material fact." *Sunbelt Sav. v. Montross*, 923 F.2d 353, 355 (5th. Cir. 1991) citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); and also citing *Pennington v. Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989); *Washington v. Armstrong World Indus.*, 839 F.2d 1121 (5th Cir. 1988). Summary judgment is not appropriate because there has not been adequate discovery in this case. *Id.* Plaintiff's inability to obtain adequate discovery results entirely from the unjust and obstructionist conduct of the defendant, thus, a continuance is further warranted. *Sunbelt Sav.* at 357-58; also see *XRT. Inc. v. Krellenstein*, 448 F.2d 882 (5th Cir. 1971).

Summary judgment is premature in light of Plaintiff's pending discovery motions before the court, particularly since Defendant Continental Airlines promised to appear, but did not; Plaintiff properly noticed the depositions; and Defendant Continental Airlines did not obtain rulings on its deposition motions to quash and for protection (including that filed on behalf of its supervisor-employee, despite its lack of standing). *Smith v. City of Jackson*, 351 F.3d 182 (5th Cir. 2003). The Fifth Circuit Court of Appeals "simply h[e]ld that the district court should have addressed [the pending discovery] motions before it ruled" on the dispositive motion. *Id.* at 198. "If the defendants did not comply with their discovery obligations such that the

plaintiffs were prohibited from presenting their best case to the district court, summary judgment in favor of the defendants improperly denied the plaintiff[ ] an opportunity to continue discovery and supplement the record." *Id.* citing *Sunbelt.*

Respectfully submitted,
/s/ Ursula Hall .
Ursula A. Hall, *Pro Se*
Post Office Box 233
Houston, Texas 77001-0233
Telephone: (713)440-6900
Telecopier: (713)440-6000
E-mail: uah@email.msn.com

Certificate of Service

I hereby certify that the foregoing was served on Defendant Continental Airlines by electronic means, to the "Lead Attorney," Louis K. Obdyke, IV, and the "Attorney to be Noticed," Danielle K. Herring, upon filing the same in the Southern District of Texas Document Filing System, CM/ECF, on this the 29th day of December, 2006.

/s/ Ursula Hall .

United States District Court for the
Southern District of Texas, Houston Division

Ursula Hall,	:	Civil Action No.
Plaintiff,	:	H-05-0158
vs.	:	
	:	
Continental Airlines Inc.,	:	
Defendant	:	
	:	Jury

Declaration Under Penalty of Perjury of Ursula Hall in Support of Plaintiff's Motion for Continuance and to Supplement the Record

STATE OF TEXAS §
HARRIS COUNTY §

"I, Ursula Hall, the undersigned declarant, am competent to make this affidavit; each and every fact stated herein is grounded in observation and firsthand personal experience.

"Each of the factual statements contained in Plaintiff's Motion for Continuance and to Supplement the Record is true and correct.

"I verify under penalty of perjury that the foregoing is true and correct.

EXECUTED on 29 December 2006.

/s/ Ursula Hall .

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

URSULA HALL,	§	
	§	
Plaintiff	§	
	§	
v.	§	CIVIL ACTION NO. H-05-0158
	§	
CONTINENTAL AIRLINES, INC.,		
	§	
Defendant	§	

FINAL JUDGMENT

For the reasons state in Magistrate Judge Mary Milloy's Memorandum and Recommendation which was adopted by this Court by Order signed on January 5, 2006, this action is DISMISSED.

THIS IS A FINAL JUDGMENT.

The Clerk will enter this Order and provide all parties with a true copy.

SIGNED on this the 5th day of January, 2007, at Houston, Texas.

/s/ Vanessa Gilmore .
Vanessa D. Gilmore
United State District Judge

Unites States District Court
for the
Southern District of Texas, Houston Division

Ursula Hall,	:	Case No.: H-05-015
Plaintiff,	:	
vs.	:	
	:	
Continental Airlines Inc.,	:	
Defendant	:	
	:	
	:	
	:	Jury
	:	

Plaintiff's Motion for Reconsideration of Summary Judgment

Plaintiff asks the court to reconsider the summary judgment entered against her, as authorized by Federal Rule of Civil Procedure 59(e).

1. The court granted defendant's motion for summary judgment, and the clerk entered judgment on January 8, 2007.

2. Plaintiff files this motion for reconsideration and asks the court to amend the summary judgment. This motion does not seek relief from the judgment under Federal Rule of Civil Procedure 60.

3. The court should grant Plaintiff's motion for reconsideration. The judgment contains clear errors of law and fact, and reconsideration is necessary to

prevent manifest injustice. *Collision v. International Chem. Workers Un. Local 217*, 34 F.3d 233, 236 (4th Cir. 1994); *see Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985).

a) Summary judgment was premature. *Sunbelt Sav. v. Montross*, 923 F.2d 353, 355 (5th. Cir. 1991) citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); and also citing *Pennington v. Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989); *Washington v. Armstrong World Indus.*, 839 F.2d 1121 (5th Cir. 1988).

b) The law-of-the-case doctrine was violated. *United States v. Mendez*, 102 F.3d 126, 131 (5th Cir. 1996); *Williams v. City of New Orleans*, 763 F.2d 667, 669 (5th Cir. 1985) quoting *White v. Murtha*, 377 F.2d 428, 431(5th Cir. 1967)).

c) A trier of fact can infer the ultimate fact of discrimination from the falsity of Continental's explanation, therefore, summary judgment cannot be granted. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

d) A written letter of "complaint," complaining of "workplace harassment," noting fear of "further retaliation," referencing the

company's policy of entitled "*Working Together Guidelines*, Continental's Comittment [sic] in the Workplace, Equal [E]mployment Opportunity in the Workplace, Reporting Harassment (Sexual or Otherwise)," is sufficient to establish "opposition" conduct. EEOC Compliance Manual, Section 614, Volume 2, http://www.eeoc.gov/policy/docs/retal.html , last accessed December 29, 2006. Also see e.g. *Barber v. CSX Distribution Servs.*, 68 F.3d 694 (3d Cir. 1995). "Workplace harassment" is a legal term of art denoting discrimination under Title VII. See e.g. *Rodriguez v. City of Houston*, 250 F. Supp. 2d 691, 702 [citations omitted] and Federal Communications Commission, Office of Workplace Diversity, Understanding Workplace Harassment, http://www.fcc.gov/owd/understanding-harassment.html, last accessed December 29, 2006.

e) An opposition letter delivered and read five (5) days before the Plaintiff was fired comprises such "tight" temporal proximity that the fact alone is sufficient to establish the causal link. *See Clark County Sch. Dist. V. Breeden*, 532 U.S. 268 (2001).

f) The Plaintiff "m[e]t all performance standards." *Document 61, p 24, 28:49* did not have a "poor" performance record. Every single rating the Plaintiff ever received in the department, from which she was fired, was "on target." According to the published performance rating

system of Continental Airlines, "OT," or "on target" is a positive performance rating: "On Target (OT) employees contribute to the organization and meet all performance standards. These employees are recognized as being essential to their job function. They are valued team members and individual contributors." *Document 61, Appendix 3, p 24:49.*

g) There is no valid evidence presented by defendant that Plaintiff committed misconduct of any sort. Comparatively, or in the alternative, the Plaintiff presented valid, probative evidence, establishing that Plaintiff did not commit any "misconduct" whatsoever. *Document 61, Appendix, p 1-4:52.*

h) Summary judgment was not appropriate; there are genuine disputes of material fact and inadequate discovery. *Sunbelt Sav. v. Montross*, 923 F.2d 353, 355 (5th. Cir. 1991) citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)

4. For these reasons, Plaintiff asks the court to grant the motion for reconsideration and render a judgment denying summary judgment.

Respectfully submitted,
/s/ Ursula Hall .
Ursula A. Hall, *Pro Se*
Post Office Box 233

Houston, Texas 77001-0233
Telephone: (713)440-6900
Telecopier: (713)440-6000
E-mail: uah@email.msn.com

Certificate of Service

I hereby certify that the foregoing was served on Defendant Continental Airlines by electronic means, to the "Lead Attorney," Louis K. Obdyke, IV, and the "Attorney to be Noticed," Danielle K. Herring, upon filing the same in the Southern District of Texas Document Filing System, CM/ECF, on this the 23rd day of January, 2007.

/s/ Ursula Hall

United States District Court for the
Southern District of Texas, Houston Division

Ursula Hall,	:	Civil Action No.
Plaintiff,	:	H-05-0158
vs.	:	
	:	
Continental Airlines Inc.,	:	
Defendant	:	
	:	
	:	Jury
	:	
	:	

Declaration Under Penalty of Perjury of Ursula Hall in Support of Plaintiff's Motion for Reconsideration of Summary Judgment

STATE OF TEXAS §
HARRIS COUNTY §

"I, Ursula Hall, the undersigned declarant, am competent to make this affidavit; each and every fact stated herein is grounded in observation and firsthand personal experience.

"Each of the factual statements contained in Plaintiff's Motion for Reconsideration of Summary Judgment is true and correct.

"Each and every document referenced in Plaintiff's Motion for Reconsideration of Summary Judgment refers to a filed, true and correct copy of the original.

"I verify under penalty of perjury that the foregoing is true and correct."

EXECUTED on 23 January 2007.

/s/ Ursula Hall .

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

URSULA HALL,	§	
	§	
Plaintiff	§	
	§	
v.	§	CIVIL ACTION NO. H-05-0158
	§	
CONTINENTAL AIRLINES, INC.,		
	§	
Defendant	§	

ORDER

Having duly considered Plaintiff's Motion for Reconsideration of Summary Judgment and Defendant's Response in Opposition, this Court finds that Plaintiff's Motion is without merit and is in all things hereby DENIED.

SIGNED on this the 21st day of February, 2007.

/s/ Vanessa Gilmore
United State District Judge

No. 07-20237

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

URSULA HALL,

Plaintiff-Appellant, *Pro Se*,

v.

CONTINENTAL AIRLINES, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR APPELLANT

Ursula A. Hall, *Pro Se*
Post Office Box 233
Houston, Texas 77001-0233
(713)440-6900

RECOMMENDATION ON ORAL ARGUMENT

The Appellant suggests that the Court would benefit greatly from oral argument. The case presents significant civil rights matters never ruled upon by published opinion and matters of first impression in the Circuit. 34(a)(3).

No. 07-20237

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

URSULA HALL,

Plaintiff-Appellant, *Pro Se,*

v.

CONTINENTAL AIRLINES, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR APPELLANT

JURISDICTION

This is an appeal from final judgment of the district court in a civil case. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291.

Performance Rating.

It is settled below that the Plaintiff engaged in legally cognizable, protected activity, opposing sexual harassment discrimination on December 18, 2002. R. at 741. It is undisputed by the defendant, and unaddressed by the court below, that the Plaintiff suffered a materially adverse employment action on January 28, 2003; namely, the Plaintiff received an unwarranted negative job evaluation. R. at 144, 874. The rating "On-Target Minus" indicates "some essential job requirements are not met." R. at 874. The unwarranted negative job evaluation constitutes an illegal, retaliatory, materially adverse employment action. See *Burlington Northern & Santa Fe Railway Co. v. White,* U.S. , 126 S. Ct. 2405, 2417, 165 L. Ed. 2d 345 (2006). An undeserved, negative performance evaluation is materially adverse because it "might well ... dissuade[ ] a reasonable worker from making or supporting a charge of discrimination." Id. at 2415. A

causal connection between the adverse action and the protected activity is established by tight temporal proximity. See *Evans v. City of Houston*, 246 F.3d 344, 354 (5th Cir. 2001) (anything less than four months has been found adequate to show causal connection for summary judgment purposes) (citing *Weeks v. NationsBank, N.A.*, 2000 U.S. Dist. LEXIS 4069, 2000 WL 341257, *3 (N.D. Tex. March 30, 2000)); *Garrett v. Constar, Inc.*, 1999 U.S. Dist. LEXIS 9361, 1999 WL 354239, *5 (N.D. Tex. May 25, 1999). A mere thirty-nine (39) days elapsed between the time of the opposition and the materially adverse employment action-undeserved negative performance rating. R. at 741, 874. Therefore, the Plaintiff has established a *prima facie* case of retaliation as a result of the retaliatory, negative, performance rating.[6]

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[6] The temporal proximity is arguably even tighter than suggested, in the instant case, because as Defendant Continental Airlines regularly, and disparagingly stated, the Plaintiff was out of office for thirty-two days (32), more than one month, after the cognizable, opposition conduct. (The Plaintiff's earned vacation was awarded, progressively, for the period of December 25, 2002 –

January 27, 2003). R. at 853; 867-871. Arguably, therefore, one must reduce the temporal proximity for all matters after January 27, 2003, by thirty-two (32) days.

Intimidation Meeting

It is settled below that the Plaintiff engaged in legally cognizable, protected activity, opposing sexual harassment discrimination on December 18, 2002. R. at 741. It is undisputed by the defendant, and unaddressed by the court below, that the Plaintiff suffered a materially adverse employment action on March 13, 2003. R. at ___. Specifically, a meeting involving a lone employee, presided over and attended by, that lone employee's immediate supervisor, the Department Director, and the Director of Human Resources, after a valid complaint of sexual harassment has been lodged, called allegedly to discuss the Plaintiff's sexual harassment claim that is instead totally devoted to threats regarding alleged performance defects, is materially adverse. Being subjected to such a meeting, under the totality of the circumstances here, "might well ... dissuade[] a reasonable worker from making or supporting a charge

of discrimination." See *Burlington Northern & Santa Fe Railway Co. v. White,* · U.S. , 126 S. Ct. 2405, 2417, 165 L. Ed. 2d 345 (2006). A causal connection between the adverse action and the protected activity is established by tight temporal proximity. See *Evans v. City of Houston,* 246 F.3d 344, 354 (5th Cir. 2001) (anything less than four months has been found adequate to show causal connection for summary judgment purposes) (citing *Weeks v. NationsBank, N.A.*, 2000 U.S. Dist. LEXIS 4069, 2000 WL 341257, *3 (N.D. Tex. March 30, 2000)); *Garrett v. Constar, Inc.*, 1999 U.S. Dist. LEXIS 9361, 1999 WL 354239, *5 (N.D. Tex. May 25, 1999). A mere eighty-five (85) days, a period of less than three months, elapsed between the time of the opposition and the materially adverse employment action-intimidation meeting. R. at 741, 874. Therefore, the Plaintiff has established a *prima facie* case of retaliation as a result of the retaliatory, intimidation meeting. Never, not once, did anyone ever

address the Plaintiff's complaints of harassment with the Plaintiff, ever again.

Suspension.

It is settled below that the Plaintiff engaged in legally cognizable, protected activity, opposing sexual harassment discrimination on December 18, 2002. R. at 741. It is undisputed by the defendant, and essentially unaddressed by the court below, that the Plaintiff suffered a materially adverse employment action on April 25, 2003. The suspension without travel benefits constitutes an illegal, retaliatory, materially adverse, ultimate employment action. See *Burlington Northern & Santa Fe Railway Co. v. White*, U.S. , 126 S. Ct. 2405, 2417, 165 L. Ed. 2d 345 (2006). A suspension from work, with or [without] pay, combined with a "lockout" for an unwarranted "[investigation]," of a type to which no one else, similarly situated, was subjected, "might well ... dissuade[ ] a reasonable worker from making or

supporting a charge of discrimination." Id. at 2415. Furthermore, it is an "ultimate employment action." A causal connection between the adverse action and the protected activity is established by tight temporal proximity. See generally *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (quoting *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001)). The temporal proximity between the date of the Plaintiff's legally cognizable opposition and the date of her suspension is a mere one hundred and twenty-seven days, or stated differently, four months and seven days (4 months and 7 days). R. at 855. There is no published[7] case in the Fifth Circuit announcing that a period of four months and seven days fails to amount to "tight temporal proximity."

Specifically, the Magistrate opined, and the district court implicitly agreed: "Courts," somewhere in

[7] *Foster v. Solvay Pharmaceuticals, Inc.*, 160 Fed. Appx. 385, 389 (5th Cir. 2005) (six months is too long); *Bell v. Bank of Am.*, 171 Fed. Appx. 442, 444 (5th Cir. 2006) ((seven months is too long),

the American legal universe, "have held that periods of less than five months between the protected activity and an adverse employment action are not, by themselves, sufficient to support the causal link necessary to a retaliation claim." R. at 741. However, no case she cited to actually held that "five months" is too long a passage of time to be of "tight temporal proximity."

The Magistrate goes on to cite the following, as allegedly direct support of her imprecise statement of law: "*See Breeden*, 532 U.S. at 273 (citing *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997)); *Raggs*, 278 F.3d at 471-72; *see also Bell v. Bank of America*, 171 Fed. Appx. 442, 444 (5th Cir. 2006)." This sentence with its "see" signal comprises the totality of the lower court's legal position on temporal proximity. R. at 741.

Breeden, cited to and signaled with "see," is inapposite because it involves a temporal proximity of twenty (20) months. The unpublished case of *Bell v.*

Bank of America, cited to and signaled with "also see" is also inapposite; it involves an alleged temporal proximity of seven (7) months. *Richmond v. ONEOK, Inc*, a reference cited to by the [Magistrate's]-"see"-signaled case of *Breeden*, is a Tenth Circuit case, that does reject a three-month period of alleged proximity, but is inapposite because, again, the Fifth Circuit has specifically disagreed with the case's holding by its published finding that "tight temporal proximity" can be found when four (4) month's time has passed. Furthermore, *Richmond v. ONEOK*, Inc. specifically supports the proposition that a "the phrase 'closely followed' must not be read too restrictively where *the pattern of retaliatory conduct* begins soon after the [protected opposition conduct] and only culminates later in actual discharge." 120 F.3d 205 (quoting *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 329 (10th Cir.), *cert. denied*, 135 L. Ed. 2d 1071, 116 S. Ct. 2552 (1996)). The Plaintiff has established a pattern of retaliatory

conduct that began long before her actual discharge, and very closely after her opposition to sexual harassment. So, the "temporal proximity" requirement must not be read too closely. Id. Legally, none of the Magistrate's cited cases support her holding on the matter of proximity.

The Fifth Circuit has held unequivocally: "Close timing between an employees protected activity and *an* adverse action against him may provide the 'causal connection' required to make out a *prima facie* case of retaliation." *Swanson v. General Services Administration*,110 F.3d 1180 (5th Cir. 1997) (citing *Armstrong v. City of Dallas*, 997 F.2d 62, 67 (5th Cir. 1993)). In the instant case, the Plaintiff presented evidence that various adverse actions were taken against her, including unfair performance review, unfair investigatory monitoring, criticism, intimidation, suspension, and ultimately, termination, immediately following her cognizable complaint of sexual

harassment, thereby satisfying the causation requirement. See *Id.*; *Ruffino v. State Street Bank and Trust Co.*, 908 F. Supp. 1019, 1046 (D. Mass. 1995).

"In cases in which the alleged retaliatory action is not immediate, there is no precise test for how long is too long to establish temporal proximity." Note, Adopting the EEOC Deterrence Approach to the Adverse Employment Action in a Prima Facie Case for Title VII Retaliation," Joan M. Savage, 46 B.C. L. Rev. 215, 226 (2004). This Court should resolve the matter for the Fifth Circuit.

Additional Proof of *Prima Facie* Causation.

Of course, "[t]o establish a *prima facie* case, the Plaintiff need only make a very minimal showing." *Nichols v. Loral Vought Sys. Corp*. 81 F.3d 38, 41 (5th Cir. 199) (quoting *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 639 (5th Cir. 1985). Moreover, "the 'causal link element' is satisfied when the plaintiff shows that the employment decision and

his protected activity were not wholly unrelated." *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 684 (5th Cir. 2001) (quoting *Simmons v. Camden County Bd. of Educ.*, 757 F.2d 1187, 1189 (11th Cir.), *cert. denied*, 474 U.S. 981, 106 S.Ct. 385, 88 L.Ed. 2d 338 (1985).

"The consideration of three factors may be helpful in determining whether a causal link has been demonstrated at the *prima facie* case stage: (1) the plaintiff's past disciplinary record, (2) whether the employer followed its typical policies and procedures when taking adverse action against the employee, and (3) the temporal relationship between the employee's conduct and the adverse act." *Beaumont v. Texas Dept. Criminal Justice*, 468 F. Supp. 2d 907, 924 (E.D. Tex. 2006) (citing *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 507-08 (5th Cir. 1994) (citing *Jenkins v. Orkin Exterminating Co.*, 646 F. Supp. 1274, 1277 (E.D. Tex. 1986)). Additionally, a Plaintiff may make out the causation element for a *prima facie* case of retaliation,

by demonstrating that the employer treated similarly situated employees, who have not engaged in protected activity, differently. *Costello v. Massachusetts Rehab. Comm'n*, 982 F. Supp. 61, 66-67 (D. Mass. 1997) ; *Carozza v. Blue Cross & Blue Shield of Mass., Inc.*, No. CA 001249-F, 2001 Mass. Super. LEXIS 506, *35-37 (Mass. Super. Ct. Nov. 16, 2001) ; also see EEOC v. BCI Coca Cola Bottling Co., 450 F.3d 476, 489 (10th Cir. 2006) *cert. granted* 127 S. Ct. 852, 166 L. Ed. 2d 681, *cert. dism'd* 127 S.Ct. 1931, 167 L.Ed. 2d 583 (2007).

The plaintiff has no meaningful "past disciplinary record." The Plaintiff was never "disciplined" in any way by Defendant-employer Continental Airlines. In fact, the only "records" that could even possibly be described as "disciplinary" in nature indicate the discrimination. Defendant Continental Airlines claimed, that the Plaintiff was fired for two (2), nondiscriminatory reasons: 1) her "overall performance record" and 2) "inaccurately representing

her contact with customers and taking credit for closing files that were not resolved." R. at 739.

As the Plaintiff has repeatedly argued, her entire "Performance History" is positive; the only ratings she ever received were "On Target". R. at 647, 668, 770. A careful review of the Plaintiff's "Performance History," for the entirety of her career in the department from which she was fired, confirms this evidentiary fact. R. at 668-69. Moreover, this evidence of consistent "on target" performance, was printed and confirmed on the day the Plaintiff was fired; the record's "footer" clearly indicates so. R. at 669. "On Target (OT) employees contribute to the organization and meet all performance standards. These employees are recognized as being essential to their job function. They are valued team members and individual contributors." R. at 874. One, like the Plaintiff, who "meets all performance standards" cannot also be reasonably said to have an "overall performance record" worthy of firing. At the

very least, resolving all doubts in favor of the nonmovant, ought to result in a finding that a material fact issue exists.

The only time Plaintiff ever suffered a negative, or disciplining, record, was a mere thirty-nine (39) days after making a complaint of sexual harassment. R. at 874. This argument and evidence were both presented in response to the Defendant's motion for summary judgment; neither was addressed by the magistrate or district court. Likewise, objections regarding the same were made in response to the magistrate's memorandum and recommendations; neither the magistrate, nor the district court, in its required *de* novo review, made any reference to this argument or evidence. Two months (2) and thirteen (13) days before the Plaintiff was fired, and ten (10) days after Plaintiff further complained of illegal retaliation, this undeserved, negative, retaliatory rating was removed, and the proper rating of "on target," because Plaintiff

"me[t] all performance standards" was instated. R. at 828. Notably, this argument is not tantamount to a dispute of the employer's assessment of the Plaintiff's performance, rather, the Plaintiff asserts that the Defendant has dishonestly represented the facts of Plaintiff's "overall performance record." See *Sandstad c. CB Richard Ellis, Inc.*, 309 F.3d 893, 899 (5th Cir. 2002). The Defendant's position changed repeatedly from Plaintiff's suspension, to termination to summary judgment; a factfinder could easily find the Defendant's position to be unworthy of belief, thereby entitling Plaintiff to go past summary judgment, at the very least.

As alleged proof of the Plaintiff "inaccurately representing her contact with customers and taking credit for closing files that were not resolved," Defendant Continental offered two items: 1) a May 14, 2002 "coaching report" regarding tone and 2) a December 16, 2002 "coaching report" regarding a Mr. Bowler. First and foremost, Defendant Continental

Airlines's letter of termination, and proffered reasons for suspension, claimed that the Plaintiff was fired based upon an investigation of files of her work performed during "the period from March 25-31, [2003]." R. at 395, 660, 772. It is impossible, therefore, for work files from the dates May 14, 2002 and December 16, 2002, to support the allegedly nondiscriminatory reasons offered for firing the Plaintiff; after-acquired evidence cannot defeat Defendant Continental's illegality. *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879 (1995). Ironically, the May 14, 2002 alleged bad work is nearly a year before the Plaintiff was fired, on May 2, 2003; and the December 16, 2003 alleged bad work is nearly five months before the Plaintiff was fired. And, subsequent to both of the dates of the alleged "bad work," the Plaintiff was deemed to have met "all performance standards." R. at 647, 811, 812, 817. Certainly when viewing these facts in the light most

favorable to the nonmoving Plaintiff, summary judgment is improper.

Additionally, the content of those two "Coaching Sessions" does not indicate "poor performance," as the term is used in company policy. "Coaching" and "counseling" are two distinct and separate mechanisms. "Coaching" events are *not* firing offenses. This is evidenced by the absence of "counseling notes" in the Plaintiff's Personnel File and the Plaintiff's positive rating of "on target," indicating she "me[t] all performance standards," during the term of these 'coaching reports," namely "07/01/2002" and "01/01/2003." R. at 647,811, 812, 817.

Furthermore, neither of the two "coaching" sessions are legally meaningful. Not only did the coaching sessions themselves and the work dates to which the refer, occur before the work performed on the dates for which the Plaintiff was fired, both sessions are insignificant: in a job, largely devoted to the effort of

pleasing the flying public, it is well understood, that sometimes, customers will be unreasonably displeased. Defendant Continental Airlines affirms this reality by rating the Plaintiff's overall performance as "on target," while also attempting to "coach" its employees to perfection.

As to the specifics of the two, alleged incidents of "bad work," which predate the dates of the work performance for which Plaintiff was ostensibly fired, it is important to note that the latter of the two, regarding Mr. Bowler in December 2002, is entirely baseless: The entirety of the Defendant's allegations regarding Mr. Bowler is misleading. The Plaintiff bore no responsibility for the day on which Mr. Bowler's letter arrived in the queue for handling; the Plaintiff did not write the letter about which Mr. Bowler complained; the Plaintiff is not the manager about whose response Mr. Bowler is complaining (and, notably that manager was not fired), and the Plaintiff received a positive, "on

target rating" for the period that included this alleged firing-worthy deficiency. R. at 817-19, 668. At the very least these facts establish a genuine issue of material fact, when weighed in the light most favorable to the Plaintiff.

Lastly, both of these two so-called "record" or "disciplinary" claims are bogus, in that that neither was a part of the Plaintiff's actual "Personnel File." The Plaintiff was given her entire Personnel File on her last day of work, as a result of her persistent requests. There was no negative work-related documentation at all. And stunningly, there was no mention of the remote "coaching sessions" regarding Mr. Bowler or tone. The entire "Personnel Record" was delivered to the Plaintiff, on the day she was fired, by the Department Director; and, the Plaintiff's entire "Personnel File" was submitted to the court below and is a part of the appellate record. Clearly, Defendant Continental Airlines dug up what they could --- two,

measly "coaching reports," dated as much as a year old, allegedly to show a poor "overall performance" record. A factfinder could certainly find this evidence significant and indicative of retaliation, when viewed in the light most favorable to the Plaintiff. These factual inconsistencies in the Defendant Continental's position are significant and should prevent summary judgment. See *Lamaire v. Louisiana*, 480 F.3d 383 (5th Cir. 2007).

No evidence of "inaccurately representing her contact with customers and taking credit for closing files that were not resolved." Defendant made no other factual assertions about the Plaintiff's alleged "personnel" or "disciplinary" records. The only other alleged factual basis for firing the Plaintiff, is an unsubstantiated claim that Plaintiff "inaccurately represent[ed] her contact with customers and t[ook]" credit for closing files that were not resolved." The Plaintiff immediately, consistently and verifiably denied these allegations. R. at 739.

Importantly, the Defendant offers no *evidence* that the Plaintiff actually "inaccurately representing her contact with customers" or "t[ook] credit for closing files that were not resolved." The Defendant offered only the conclusory statements of Judy Dyar, a non-employee, lay witness, properly subpoenaed, who never appeared for deposition, and on whose behalf Continental Airlines sought to quash the notice, but never received an order doing so. This outrageous refusal to appear, results in the prematurity of summary judgment: the plaintiff was unable to depose any of the properly noticed, defense "witnesses." The Plaintiff moved to strike the summary judgment evidence of Judy Dyar, as a result, however, it remain unaddressed. Undeniably, absent an order excusing one's appearance at a properly noticed deposition, the Defendant's duty to appear remains; nonetheless, Defendant Continental did not appear. *Hare v. Government Employees, Ins. Co.*, 132 F.R.D. 448 (E.D. Tex. 1990).

Nonetheless, and very importantly, Plaintiff offered evidence, sufficient to defeat summary judgment. R. at 660-665. And, the Plaintiff offered a favorable evidentiary finding, on the matter of the alleged misconduct, from the Texas Workforce Commission. R. at 682.

Defendant Continental Airlines had a full and fair opportunity to litigate the matter of the Plaintiff's alleged "misconduct" of "inaccurately representing her contact with customers and taking credit for closing files that were not resolved." R. at 682-84. Significantly, the hearing before the Commission was the only opportunity Plaintiff had to confront the witness-affiant Judy Dyar. Both parties submitted evidence, Plaintiff represented herself, Defendant Continental Airlines was represented by a commercial entity whose business is the representation of employers in worker disputes, both parties were available for cross examination, and both parties

presented their respective positions to the tribunal. R. at 682-84. The tribunal concluded that the Plaintiff was not guilty of any misconduct. R. at 682.

The Texas Workforce Commission found that the "employer failed to provide physical evidence or testimony from customers to the stated charges and the [Plaintiff] received no warnings prior to her discharge, in order to correct any problems, the [Plaintiff's] testimony that she did not close cases improperly will take precedence in this decision." R. at 682. The Texas Workforce Commission findings should have been treated as "highly probative." *Smith v. Universal Services, Inc.*, 454 F.2d 154, 157 (5th Cir. 1972). The advisory committee notes to the federal rules make clear that the rule of evidence "makes no distinction between federal and nonfederal offices and agencies." Fed. R. Evid. 803. Neither the magistrate nor the district court made any reference to this evidence at all. Furthermore, despite a full and fair opportunity to do

so, Defendant Continental Airlines did not dispute this finding [favoring the Plaintiff], by [the] appeal [tribunal], on the matter of whether the Plaintiff "inaccurately represent[ed] her contact with customers" or "t[ook] credit for closing files that were not resolved." At the very least, abiding by the rules of law applicable to summary judgment, a genuine fact issue on the matter of misconduct exists. When specifically weighed and analyzed, all three of these indicia of causation weigh in favor of the Plaintiff. *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498 (5th Cir. 1994).

Letter of termination is itself an "adverse action."

The termination letter written by Defendant Continental Airlines is tantamount to a post-employment, retaliatory review. Its contents requires Plaintiff announce to any future employer that she was discharged for alleged theft and dishonesty--- all of which is simply untrue, and at the very least unproven. Of course, post-[employment] conduct or effects can be

retaliatory! See *Robinson v. Shell* Oil Co., 519 U.S. 337, 117 S.Ct. 843, L. Ed. 2d 808 (1997); *Szymanski v. County of Cook*, 468 F.3d 1027, 1029 (7th Cir. 2006).

Defendant Continental Airlines did not follow its typical procedures.

Not only are "seconds" not a basis for firing, the record clearly indicates many people, none of whom were fired and all of whom were similarly situated to plaintiff, had many "seconds." R. at 771, 797, 847. Plaintiff w not allowed to respond to the "investigatory results" at all, despite promised procedures to the contrary. R. at 841-850; 852-56; 859; 862-63; 880-86; 887-88.

Termination.

It is settled below that the Plaintiff engaged in legally cognizable, protected activity, opposing sexual harassment discrimination on December 18, 2002. R. at 741. And, undeniably, the Plaintiff was terminated on May 2, 2003. As a matter of law, of course, the Plaintiff's termination constitutes a materially adverse

employment action. See *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 2417, 165 L. Ed. 2d 345 (2006). Losing one's job, because one opposed the discriminatory conduct of one's supervisor, because it highly likely to "dissuade[ ] a reasonable worker from making or supporting a charge of discrimination." Id. at 2415. A causal connection between the adverse action and the protected activity is established by tight temporal proximity. See *Evans v. City of Houston*, 246 F.3d 344, 354 (5th Cir. 2001) (anything less than four months has been found adequate to show causal connection for summary judgment purposes) (citing *Weeks v. NationsBank, N.A.*, 2000 U.S. Dist. LEXIS 4069, 2000 WL 341257, *3 (N.D. Tex. March 30, 2000)); *Garrett v. Constar, Inc.*, 1999 U.S. Dist. LEXIS 9361, 1999 WL 354239, *5 (N.D. Tex. May 25, 1999).

One hundred and thirty-five (135) days, or stated differently, four (4) months and fifteen (15) days,

elapsed between the time of the protected opposition to discrimination and the materially adverse employment action- termination. R. at 741, 874. The law cited to by the Magistrate is not definitive: effectively, the cited authorities state that temporal proximity is "tight" if the time lapse is four months and temporal proximity is not "tight" if the time lapse is seven (7) months or twenty (20) months. No authority cited to, signaled to, quoted by signaled cases, or legally relevant here, resolves the matter of a termination that occurs four months and fifteen days after protected opposition activity.

Additionally, the case of *Richmond v. ONEOK*, Inc., relied upon by the Magistrate found that "the phrase 'closely followed' must not be read too restrictively where *the pattern of retaliatory conduct* begins soon after the [protected opposition conduct] and only culminates later in actual discharge." 120 F.3d 205, quoting *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 329 (10th Cir.), *cert. denied*, 135 L. Ed. 2d 1071,

116 S. Ct. 2552 (1996). In the instant case, the pattern of retaliatory conduct against the Plaintiff began soon after the protected activity and culminated, four months and fifteen days later, in an ultimate adverse employment action.

As a result of the nonexistent legal standard in this Circuit, or any other referenced circuit, the Magistrate had a duty to rule in favor of the nonmoving party. Fed. R. P. 56. All doubts should be resolved in favor of the nonmoving party. Id Therefore, the Plaintiff has established a *prima facie* case of retaliation as a result of the retaliatory, negative, performance rating.

Letter complaining of "workplace harassment" and "further retaliation" is protected opposition. Additionally, or in the alternative, Plaintiff has argued that a reasonable person in the position of Gigi Jensen, a human resources executive, was complaining about discrimination, including retaliation, under Title VII.

Reynolds v. Golden Corral, 106 F. Supp. 2d 1243 (D. Ala. 1999); *Burns v. Republic Savings Bank*, 25 F. Supp. 2d 809 (N.D. Ohio 1998); *Garcia-Paz v. Swift Textiles*, Inc., 873 F. Supp. 547, 559-60 (D. Kan. 1995). Furthermore, and very significantly, "the United States Supreme Court has determined that retaliation is simply a different form of discrimination, and one that is included within broad-based prohibitions of discrimination." *Humphries v. CBOCS*. 474 F.3d 387, 400 (7th Cir. 2007). Undeniably, a reasonable trier of fact, looking at the entire [context] of Plaintiff's termination, could find Plaintiff's letter of April 29, 2003, to be protected "opposition," and that Plaintiff established pretext by its tight temporal proximity of five days, before her firing.

The letter read, in part:

> A[p]ril 29, 2003
> Ms. Gigi Jensen, Director, Human Resources,
> Reservations Division...
> Re: Complaint

> Dear Ms. Jensen:
>
> I hereby complain of workplace harassment. I direct this complaint to you because I fear further retaliation by my superior(s). In addition, I hereby complain that my superiors violated their duties to me, as those duties are delineated in company policy. Further, I hereby complain that my superiors have violated my due process rights, as established by Continental Airlines' Performance Improvement Process. Among other things, "Continental Airlines expressly prohibits retaliation against any person filing a complaint of harassment or against any person participating in an investigation. [1]...
>
> [1] *Working Together Guidelines*, Continental's Comittment [sic] in the Workplace, Equal [E]mployment Opportunity in the Workplace, Reporting Harassment (Sexual or Otherwise), p. 6.

It strains all manner of intelligence, even among the inexpert like the Plaintiff, to believe that this text, and its specific footnote reference to the company's workplace harassment guidelines, specifically mentioning the "Reporting [of] Harassment (Sexual or Otherwise) does not alert a human resources professional to the Plaintiff's claims.

"Workplace harassment" is a legal term of art denoting discrimination under Title VII. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1001 (1998) (stating that Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment") (emphasis added) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (citations and internal quotation marks omitted)). "...The Equal Employment Opportunity Commission ("EEOC") promulgated guidelines to assist employees and employers in determining what constitutes workplace harassment." Timothy Schiell, Book Review: Campus Hate Speech on Trial, 8 B.U. Pub. Int. L.J. 579.

Magistrate Milloy herself uses the term is a published opinion from this court: "In this circuit, an employer is not entitled to summary judgment on a *Faragher/Ellerth* affirmative defense if the complainant can show that she complied with the employer's own policy on reporting workplace harassment.")." Rodriguez v. City of Houston, 250 F. Supp. 2d 691, 702 [citations omitted].

"Workplace harassment is a form of discrimination." Federal Communications Commission, Office of

Workplace Diversity, Understanding Workplace Harassment. http://www.fcc.gov/owd/understanding-harassment.html, last accessed December 29, 2006. "Title VII solely addresses workplace harassment..." James E. Robertson, 36 Am. Crim. L. Rev. 1, Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates [citations omitted]. "Many states are developing distinctive bodies of law about workplace harassment...Discrimination cases are more plentiful by two orders of magnitude, yet in the 33 years since Title VII was enacted the Supreme Court has heard only two involving workplace harassment. Prospects for a uniform federal common law in this field are dim." *Jansen v. Ellerth*, 123 F.3d 490, 554, 556 (7th Cir. 1997).

While the Plaintiff may not have used the "magic words," clearly the quoted letter statement brings her complaints into context and supports the reasonable inference that Title VII violations were the reason for her complaint. Furthermore, the letter was preceded by a specific oral complaint to the same human resources manager and it complies with the directions in company policy. At the very least, Plaintiff's letter implicitly communicated her Title VII complaints; after all, it is the sole basis upon which Defendant Continental

"publishes" its workplace harassment guidelines. One engages in legally cognizable "opposition" whenever one "explicitly or implicitly communicates to his or her employer or other covered entity a belief that its activity constitutes a form of employment discrimination that is covered by any of the statutes enforced by the EEOC." EEOC Compliance Manual, Section 614, Volume 2, http://www.eeoc.gov/policy/docs/retal.html , last accessed December 29, 2006. Also see e.g. Barber v. CSX Distribution Servs., 68 F.3d 694 (3d Cir. 1995).

Surely, as a matter of law, this letter constitutes implicit opposition to discrimination and can serve as the basis for the claim; alternatively, it presents a genuine issue of fact.

This opposition letter was delivered and read five (5) days before the Plaintiff was fired. And such "tight" temporal proximity alone is sufficient to establish the causal link. *See Clark County Sch. Dist. V. Breeden*, 532 U.S. 268 (2001).

Summary Judgment is premature. "Summary judgment is appropriate only if, after adequate discovery, there is no genuine dispute over any material fact." *Sunbelt Sav. v. Montross*, 923 F.2d 353, 355 (5th. Cir. 1991) citing *Celotex Corp. v. Catrett*, 477 U.S. 317,

106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); and also citing *Pennington v. Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989); *Washington v. Armstrong World Indus.*, 839 F.2d 1121 (5th Cir. 1988). Summary judgment is not appropriate because there has not been adequate discovery in this case. *Id.* Plaintiff's inability to obtain adequate discovery results entirely from the unjust and obstructionist conduct of the defendant, thus, a continuance is further warranted. *Sunbelt Sav.* at 357-58; also see *XRT. Inc. v. Krellenstein*, 448 F.2d 882 (5th Cir. 1971).

Summary judgment is premature in light of Plaintiff's pending discovery motions before the court, particularly since Defendant Continental Airlines promised to appear, but did not; Plaintiff properly noticed the depositions; and Defendant Continental Airlines did not obtain rulings on its Motions to Quash and Protection (including that filed on behalf of its supervisor-employee, despite its lack of standing). *Smith v. City of Jackson*, 351 F.3d 182 (5th Cir. 2003). The Fifth Circuit Court of Appeals "simply h[e]ld that the district court should have addressed [the pending]

motions before it ruled" on the dispositive motion. *Id.* at 198. "If the defendants did not comply with their discovery obligations such that the plaintiffs were prohibited from presenting their best case to the district court, summary judgment in favor of the defendants improperly denied the plaintiff[ ] an opportunity to continue discovery and supplement the record." *Id.* citing *Sunbelt*.

The law of the case doctrine resolves any issue of timeliness in favor of the Plaintiff. In a prior summary judgment ruling, by Magistrate Milloy, to which Defendant Continental Airlines did not object, and for which the time for objection has passed, it was established in the case that Ursula Hall timely filed her Complaint. *See* Docket Instruments 15, 16, 17, 18, and 33.

Law of the case is sound judicial doctrine recognized by the Fifth Circuit, United States v. Mendez, 102 F.3d 126, 131 (5th Cir. 1996), and all other federal courts. As well stated by Circuit Court of the District of Columbia: "Inconsistency is the antithesis of the rule of law... Two time-honored doctrines help put that principle into practice. The first is the law-of-the-case doctrine: the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*..." The finality, promoted by the doctrine, is the finality upon

which Plaintiff reasonably relied in this case. The magistrate, through a prior summary judgment ruling, had already established the law of the case on the matter of timeliness: after reviewing motion, response and evidence, Magistrate Milloy ruled, without objection to her ruling, that Ursula's complaint was timely. *See* Docket Instrument 33. She even admonished the Defendant: "No further motions to dismiss under Rule 12 (b)(6), will be allowed as it is clearly inapplicable to Plaintiff's complaints."

In the disposing motion for summary judgment, Defendant Continental makes the exact same arguments and alleged factual presentations, as it presented in the previously denied summary judgment. Nothing in the "the evidence on a subsequent [motion] was substantially different, [nor has] controlling authority ... since made a contrary decision of the law applicable to such issues, [n]or [was] the decision ... clearly erroneous [such that it] would work a manifest injustice." *Williams v. City of New Orleans*, 763 F.2d 667, 669 (5th Cir. 1985) quoting *White v. Murtha*, 377 F.2d 428, 431(5th Cir. 1967)). In fact, manifest injustice only accrues to the Plaintiff under the Magistrate's Memorandum and Recommendations, because the law of the case doctrine was violated.

The law of the case doctrine dictates that Plaintiff timely filed her complaint. *See* Order, Docket Instrument 33. As a direct result of Defendant's conduct, which conduct contravened the rule of law and the local rules of this court, the Magistrate converted the Defendant's 12(b) motion as a motion for summary judgment. *See* Docket Instrument 15. Evidence was submitted, in summary judgment fashion, on the sole matter of the timeliness of Plaintiff's complaint, and the Magistrate ruled the complaint timely. *See* Order, Docket Instrument 33. Resultantly, the matter of timeliness was forever foreclosed; there have been no intervening changes in law, fact, or circumstance to warrant an exception to the doctrine of the law of the case.

Additionally, or in the alternative, Magistrate Milloy committed legal error by applying the law of *Taylor* to this case at all. Taylor involves a case wherein the defendant and the court properly remained within the confines of the pleadings to determine a 12(b)6 motion; the complaint was "facially untimely." *Taylor v. Books-A-Million, Inc.*, 296 F.3d 376 (5th Cir. 2002). The holding in that case, applies solely to the circumstance where rule 12(b)6 is abided; if the Defendant had not circumvented the rules of procedure and the local rules of court, and been allowed to do so

by Magistrate's conversion of the motion, then Taylor and its "presumption" progeny would apply. One need not list the exact date of receipt in one's complaint as a general matter. However, if the date is not present and "no outside evidence" on the matter is presented, the 12(b)6 motion must be granted.

Alternatively, Plaintiff hereby, and simultaneously in a separate docket instrument, motions the court to allow "supplementation" of the record, with the exact same evidence, previously filed, and favorably ruled upon, on the matter of timeliness. Specifically, Plaintiff asked the district court to consider Plaintiff's response to Defendant's first motion for summary judgment, found at Docket Instruments 16 and 17, as if the same were restated and fully incorporated herein; the court did not rule on supplementation. And the district court had a duty to review all matters objected to *de novo*; it appears the court did not do so.

Plaintiff presented evidence that her entire "performance history" in the company was positive. Plaintiff presented evidence that there was no evidence of misconduct of any sort. Plaintiff presented proof that there as no evidence of unduly "taking credit" for files.

None of these assertions or evidence were addressed by Magistrate Milloy at all.

Plaintiff presents evidence that Continental Airline's alleged reasons for firing her are not believable at all. The company's "performance history" statement alone makes that clear: every rating the Plaintiff ever received was "on target." A trier of fact can infer the ultimate fact of discrimination from the falsity of Continental's explanation, therefore, summary judgment cannot be granted. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Plaintiff Established pretext. Again, in error, The Magistrate found, and the district court adopted her finding, that Plaintiff failed to present any evidence of pretext. R. at 742. Of course, "...a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

Circumstantially, a plaintiff may establish "but for" causation, in a retaliatory discrimination case, by showing that the employer's purported nonretaliatory

reasons for the employment action are pretextual. *Septimus v. Univ. of Houston*, 399 F.3d 601, 607-08 (5th Cir. 2005). Upon successfully rebutting each of the reasons articulated by the employer, the Plaintiff meets her burdens regarding pretext and "but for" causation. *Laxton v. Gap Inc.*, 333 F.3d 572, 578 (5th Cir. 2003).

The two, purportedly nonretaliatory reasons for terminating the Plaintiff, cited to in the Memorandum and Recommendations adopted by the court, are: (1)Plaintiff's "overall Performance Record" and, (2)"the severity of her actions in inaccurately representing her contact with customers and taking credit for closing files that were not resolved." R. at 739. Plaintiff has created a genuine issue of fact as to both issues, if not entitlement to summary judgment in her favor. The factual differences between the Defendant's alleged reasons for suspension and discharge, as stated in the letter of termination and the motion for summary

judgment are significant, and in and of themselves, create a factual dispute preventing summary judgment. See generally *Lamaire v. Louisiana*, 480 F.3d 383 (5th Cir. 2007).